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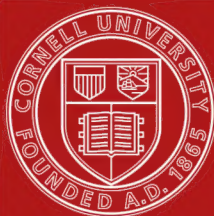
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A TREATISE
ON THE
LAW OF NEGLIGENCE

BY
THOMAS G. SHEARMAN
AND
AMASA A. REDFIELD

FIFTH EDITION
SUBSTANTIALLY REWRITTEN

IN TWO VOLUMES

VOL. II

NEW YORK
BAKER, VOORHIS & COMPANY
1898

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By THOMAS G. SHEARMAN AND AMASA A. REDFIELD.

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WEED-PARSONS PRINTING COMPANY
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CHAPTER XVI.

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§ 385. **Turnpikes are highways.**—A turnpike is a public highway, established by public authority, for public use, and is regarded as a public easement. The only difference between it and a common highway is, that instead of being made in the first instance at the public expense, it is authorized and laid out by public authority, and made at the expense of individuals, and the cost of construction and maintenance is reimbursed by a toll, levied for that purpose by public authority,¹ — every person having the right to use it for travel, subject only to the payment of toll.

§ 386. **Maintenance of road.**—In consideration of the right to collect such tolls, the proprietors of the road undertake to exercise ordinary care and diligence in keeping it in such a state of repair that it may be traveled with safety to life and property.¹ In the absence of a statute imposing upon the

¹ *Commonwealth v. Wilkinson*, 16 Pick. 175, per Shaw, C. J. See, also, *Turnpike Road v. Brosi*, 22 Pa. St. 29; *Stormfeltz v. Turnp. Co.*, 13 Id. 555; *Sturtevant v. Plymouth Co.*, 12 Metc. 7; *Mathews v. Winooski Turnp. Co.*, 24 Vt. 480; *Heath v. Barman*, 49 Barb. 496; *Buncombe Turnp. Co. v. Baxter*, 10 Ired. Law, 222; *Clarksville, etc. Turnp. Co. v. Atkinson*, 1 Sneed, 426; *Louisville, etc. Turnp. Co. v. Nashville, etc. Turnp. Co.*, 2 Swan, 282. The same is true of plank-roads (*Fort Edward,*

etc. Plank-road Co. v. Payne, 17 Barb. 567; *Benedict v. Goit*, 3 Barb. 459; *Plank-road Co. v. Thomas*, 20 Pa. St. 91).

¹ *Townsend v. Susquehanna Turnpike Co.*, 6 Johns. 90; *People v. Hillsdale Turnp. Co.*, 23 Wend. 254; *Goshen, etc. Turnp. Co. v. Sears*, 7 Conn. 86; *Wilson v. Susquehanna Turnp. Co.*, 21 Barb. 68; *Frankfort Bridge Co. v. Williams*, 9 Dana, 403; *Grigsby v. Chappell*, 5 Rich. Law, 443; *Ward v. Newark, etc. Turnp. Co.*, 1 Spencer, 323; *People v. Ply-*

company an absolute liability, it is not a warrantor of the safety of its road, but, like a municipal corporation, is held to the exercise of ordinary care and skill only² in the construction and management of its roads, bridges and toll-gates;³ and it is liable to any person suffering damages from its failure to exercise such care and skill.⁴ Its want of funds is no excuse for a failure to keep the road in repair, so long as it is kept open for travel.⁵

§ 387. **Statutory liability for non-repair.**—In Massachusetts and Vermont, and, perhaps, in some other states, turnpike companies are made liable by statute for all damages happening to travelers from want of repair of their roads. Under

mouth Plank-road Co., 32 Mich. 248; Franklin Turnp. Co. v. Crockett, 2 Sneed, 263; Baltimore, etc. Turnp. Co. v. Cassell, 66 Md. 418; Baltimore, etc. Turnp. v. Crowther, 63 Md. 558; Brookville Turnp. Co. v. Pumphrey, 59 Ind. 78; Zuccarello v. Nashville, etc. R. Co., 3 Baxt. 364.

² Townsend v. Susquehanna, etc. Turnp. Co., 6 Johns. 90; Tift v. Towns, 53 Ga. 47; Murfreesboro, etc. Co. v. Barrett, 2 Cold. 508; Baltimore, etc. Turnp. Co. v. Parks, 74 Md. 282; 22 Atl. 399; Speer v. Greencastle Road Co., 4 Ind. App. 525; 31 N. E. 381; and cases, *supra*. It is liable to indictment for a defect in the road (Syracuse, etc. Plank-road Co. v. People, 66 Barb. 25; Kimbrough v. State, 10 Hump. 97).

³ The toll-gate keeper shut the gates at an unusual hour of the night and placed a bar in its place, not easily discernible in the dark, against which plaintiff's horse being driven was killed. Held, company liable (Dudley v. New Orleans Canal Co., 5 La. Ann. 297; Danville, etc. Turnp. Co. v. Stewart, 2 Metc. [Ky.] 119).

⁴ Their liability for damages occurring to travelers from defects in their road or its management, is said to be analogous to that of a railroad com-

pany which undertakes to carry for fare, which is another name for toll (Davis v. Lamoille, etc. Plank-road Co. 27 Vt. 602); but it is difficult to see how a road or bridge company can be considered in the light of common carriers (see Frankfort Bridge Co. v. Williams, 9 Dana, 403). The liability is more like that of a canal company, which is to take reasonable care, that its canal may be navigated without danger to lives or property (Parnaby v. Lancaster Canal Co., 11 Ad. & El. 223). Tindal, C. J., placed the company's liability on the same principle which makes a shop-keeper, who invites the public to his shop, liable for neglect in leaving a trap-door open without any protection, by which his customers suffer injury. In Ireland v. Oswego Plank-road Co. (13 N. Y. 526 [unguarded precipice]), the duty of defendant to use reasonable care to keep its road safe was said to be the same as that required of public road-officers. S. P., Eggleston v. Columbia Turnp. Co., 82 N. Y. 278 [pile of stones on road frightening horse].

⁵ Waterford Turnp. Co. v. People, 9 Barb. 161.

such a statute, the common-law remedy for damages is taken away, and the action can be maintained only by a person from whom toll is demandable;¹ and the company is an insurer of the safe condition of its road, and is responsible even for latent defects in it.² Whenever the danger to travel results from general decay, and is not open and visible to all, the company is nevertheless responsible, so long as it takes toll.³

§ 388. Re-appropriation of road by the public.—The duty to repair a turnpike continues until the highway has been appropriated by the public in conformity with law.¹ In Connecticut, the extreme doctrine is maintained that a turnpike company is liable for the non-repair of its road until the company is dissolved, or at least until the road has been abandoned so long as to furnish a presumption of its legal dissolution.² But, in general, we think a turnpike company is bound to keep its road in repair only so long as it retains its management, and keeps it open for travel.³

¹ *Williams v. Hingham Turnp. Co.* 4 Pick. 341; *Baxter v. Winooski Turnp. Co.*, 22 Vt. 114. Remedy by indictment or action on the case are not taken away by a statute which merely imposes a penalty for non-repair (*Susquehanna, etc. Turnp. Co. v. People*, 15 Wend. 267; see *Waterford, etc. Turnp. Co. v. People*, 9 Barb. 161; *People v. Goshen Turnp. Co.* 11 Wend. 597; *Syracuse, etc. Plank-road Co. v. People*, 66 Barb. 25 [all indictments]; *Schuylkill Nav. Co. v. McDonough*, 33 Pa. St. 73; see *Pennsylvania, etc. Canal Co. v. Graham*, 63 Id. 296).

² *Johnson v. Salem Turnp. Corp.* 109 Mass. 522; *Yale v. Hampden Turnp. Co.*, 18 Pick. 357; see *Davis v. Lamoille Plank-road Co.*, 27 Vt. 602.

³ In *Randall v. Cheshire Turnp. Co.* (6 N. H. 147), the company's officer warned a traveler about to cross a bridge that it was unsafe and that he had better take another route. Held, the company was lia-

ble for his injury from a defect in the bridge. "It is not enough that they give notice that there is danger; they must give notice that there is danger for which they will not be answerable, and must refuse to take toll."

¹ *Marsh v. Branch Road*, 17 N. H. 444.

² *Reed v. Cornwall*, 27 Conn. 48. There held that the town was not estopped, by reason of its having repaired the road, from denying its liability for a defect therein; that, under the statute concerning highways and bridges, a liability to keep the road in repair could not exist in the town and in the turnpike company at the same time. But see *Proctor v. Andover*, 42 N. H. 362; *State v. Alburgh*, 23 Vt. 262.

³ See *Ward v. Newark Turnp. Co.*, 1 Spencer, 323; *People v. Hillsdale Turnp. Co.*, 23 Wend. 254; *Barton v. Montpelier*, 30 Vt. 650; *Bryant v. Biddeford*, 39 Me. 193; *Wellsborough, etc. Co. v. Griffin*, 57 Pa. St.

§ 389. **Effect of change of control of road.**—The acquisition by another of the right to use the road will not necessarily relieve from further obligation the one originally liable for its non-repair, as where the proprietors of a bridge allow it to be used by a railroad company, or the latter, by legal proceedings, acquires the right to use it. The proprietors are bound to guard against dangers which may arise from such new use.¹ So, where a turnpike was occupied by a street railway, the proprietors of which were bound by law to repair that portion occupied by its tracks, the turnpike company is liable to a traveler on the turnpike injured by driving upon a pile of snow thrown from its track by the railroad company.²

417 [company not liable after sale of its road under foreclosure].

¹ *Peoria Bridge Co. v. Loomis*, 20 Ill. 235; see *Ammerman v. Wyoming Canal Co.*, 40 Pa. St. 256; *Commonwealth v. Worcester Turnp. Co.*, 3 Pick. 327. The owner of a bridge franchise contracted with a railroad company to build the bridge and keep it in repair, he to be entitled to all tolls, except on the passengers and freight of the company. Held, that he was liable for defects (*Tift v.*

Towns, 53 Ga. 47). In *Born v. Allegheny, etc. Plank-road Co.* (101 Pa. St. 334), company held liable for an injury which occurred while the road was in the temporary occupation of one who was engaged in building.

² *Johnson v. Salem Turnp. Co.*, 109 Mass. 522. See *Mathews v. Winoski Turnp. Co.*, 24 Vt. 480, *Willard v. Newbury*, 22 Id. 458; *Wayne Turnp. Co. v. Berry*, 5 Ind. 286.

CHAPTER XVII.

BRIDGES.

<p>§ 390. Bridges distinguished from highways.</p> <p>391. [Consolidated with § 390.]</p> <p>392. Approaches to bridge.</p> <p>393. Abutments and railings.</p> <p>394. By whom bridges are repairable.</p>	<p>§ 395. Bridge across navigable stream.</p> <p>396. Management and protection of draw-bridges.</p> <p>397. Toll-bridges.</p>
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§ 390. **Bridges distinguished from highways.** — Questions relating to negligence in the construction and maintenance of public bridges, as a species of highways, have been already considered in the chapters on Municipal Corporations, and on Highways. It is only necessary to speak now of matters relating to bridges, wherein they differ from ordinary highways. The term “highway,” in a statute, does not import a bridge, and, therefore, to charge a party with neglect in building or repairing a bridge, it must be by the term “bridge,” which alone describes such a structure.¹ A bridge of public utility, though built by an individual for his own convenience, if dedicated to, and accepted by, the community, is a public bridge.² Its mere user, if proved to be of public utility, is sufficient proof of adoption, without formal acceptance.³ At

¹ *State v. Canterbury*, 28 N. H. 195. See *Osmond v. Widdicombe*, 2 Barn. & Ald. 49.

² *Rex v. Bucks*, 12 East, 192; *Dyger v. Schenck*, 23 Wend. 446; *Requa v. Rochester*, 45 N. Y. 129 [bridge, placed by a third party across a gutter, had been allowed by the city to remain for years; city liable for its safe condition]. “A bridge built by an individual over a public highway, and used by the public, must be kept in repair by the public” (*Heacock v. Sherman*, 14

Wend. 58). s. p., *Houfe v. Fulton*, 34 Wisc. 608 [town using bridge built by the county must repair it]; *State v. Compton*, 2 N. H. 513.] An individual who has built a bridge over a private way, is not indictable for its non-repair, though it is generally used by the public (*State v. Seawell*, 3 Hawks, 193).

³ *Marseilles v. Howland*, 124 Ill. 547; 16 N. E. 883. The fact that a bridge constructed by a county as part of a public road leads up to and joins a street at the corporate limits

common law, it is indispensable to the character of a bridge repairable by a county that it should span a water-course, a bridge being regarded as a substitute for a ferry;⁴ though the mere fact that an arch passes over a stream does not necessarily make it a bridge; it may be a culvert, and, whether it is one or the other, is a question of fact.⁵ In this country, statutes which impose the duty of building and maintaining bridges usually define what is intended by the term bridge, but, unless the import of the term is limited by statute, it means a passage-way for travelers over streams or other obstacles in the highway, otherwise impassable.⁶

§ 391. [consolidated with § 390.]

§ 392. **Approaches to bridges.**—The approaches to a bridge constitute a part of it, and a duty to repair the bridge includes the repair of its approaches.¹ Where the maintenance of a bridge is imposed upon one, and the maintenance of the highway leading to and across it is imposed upon another, the question sometimes arises as to the distance from the extremities of the structure of the bridge at which the responsibility of the one ends and that of the other begins. By

of a town, does not make it a town bridge, so as to relieve the county (Owen county v. Washington, 121 Ind. 379; 23 N. E. 257).

⁴ Per Savage, C. J., *People v. Saratoga*, etc. R. Co., 15 Wend. 133.

⁵ *Rex v. Whitney*, 3 Ad. & El. 69, 71; *Tolland v. Willington*, 26 Conn. 578. See *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116 [railroad viaduct not a bridge]; *Smith v. Wright*, 27 Barb. 621 [bridge over a ravine or pond not "a bridge" under statute]; *Casey v. Tama county*, 75 Iowa, 655; 37 N. W. 138.

⁶ *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *Sussex v. Strader*, 18 N. J. Law, 108, 112; *State v. Gorham*, 37 Me. 451; *Tolland v. Willington*, 26 Conn. 578; *Bardwell v. Jamaica*, 15 Vt. 438; *Reg. v. Gloucestershire*, 1 Carr. & M. 506.

¹ *Hayes v. R. R. Co.*, 9 Hun, 63; *Titcomb v. Fitchburg R. Co.*, 12 Allen, 254; *Commonwealth v. Deerfield*, 6 Id. 449; *White v. Quincy*, 97 Mass. 430; *Sussex v. Strader*, 18 N. J. L. 108; *Daniels v. Athens*, 55 Ga. 609; *Albee v. Floyd Co.*, 46 Iowa, 177. Whatever approach is necessary to connect the structure of a highway bridge and stone abutments on which it rests with the highway built on solid ground, and to make the structure accessible from the highway, is part of the bridge (*Tinkham v. Stockbridge*, 64 Vt. 480; 24 Atl. 761). Not being bound to repair a state bridge, though within its corporate limits and in continuation of its street, a city is not bound to repair the approaches to such bridge (*Carpenter v. Cohoes*, 81 N. Y. 21).

the common law of England, a space of three hundred feet from either end of the bridge is to be taken as part of the bridge itself, and, as such, is repairable by the county.³ No such precise and definite rule prevails in this country.³ To what distance from either end of the bridge a bridge-company is bound to repair the approaches to it, is to be determined by the statute which grants the franchise, or, if not declared by statute, then by a consideration of what is reasonable under the circumstances.⁴ A bridge-company which has practically adopted, as a part of its bridge, a way which connects the bridge with the highroad is responsible for the condition of such connecting way.⁵ It is clear that the approach should not be of less width than the bridge, but it need not be of greater width so as to conform to the width of the highway leading to it.⁶

§ 393. Abutments and railings. — The term bridge imports not only the structure itself and its approaches, but its abutments,¹ embankments and railings,² all of which must be

³ *Rex v. West Riding of York*, 7 East, 588; *Rex v. Devon*, 14 Id. 477. This distance was fixed by Stat. 22 Hen. VIII., § 5, which was declaratory of the common law (*Reg. v. Lincoln*, 8 Ad. & El. 65).

³ *Titcomb v. Fitchburg R. Co.*, 12 Allen, 254; *Commonwealth v. Deerfield*, 6 Id. 449.

⁴ *Commonwealth v. Deerfield*, 6 Allen, 449. There the question was whether a stream, having been widened by washing during a flood, the bridge company, having a franchise to construct a bridge across a stream (no other limitation being expressed in the franchise), was bound to extend the bridge to fit the new width of the stream. Held, that it was. Whether an approach is part of a bridge, repairable by the county, is for the jury (*Newcomb v. Montgomery county*, 79 Iowa, 487; 44 N. W. 715). See *Saunders v. Gun Plains*, 76 Mich. 182; 43 N. W. 1088

[plankwalk for pedestrians laid on bridge approach, no part of bridge].

⁵ *Watson v. Lisbon Bridge*, 14 Me. 201.

⁶ A railroad company cannot be compelled to restore the approaches to a bridge, appropriated by it, to their original width, the approaches being of the same width as the bridge (*Reg. v. Birmingham, etc. R. Co.*, 2 Q. B. 47). But see *Regina v. London, etc. R. Co.*, 1 Railw. Cas. 323; 1 Redf. on Railw. 190.

¹ *Sussex v. Strader*, 18 N. J. Law, 108; *Parker v. Boston, etc. R. Co.*, 3 Cush. 107; *Bardwell v. Jamaica*, 15 Vt. 438; *Tolland v. Willington*, 26 Conn. 578; *Rusch v. Davenport*, 6 Iowa, 455.

² *Holley v. Winooskie Turnpike*, 1 Aik. 74; *Rice v. Montpelier*, 19 Vt. 470; *Palmer v. Andover*, 2 Cush. 600; *Hayden v. Attleborough*, 7 Gray, 338; *Woods v. Groton*, 111 Mass. 357; *Woodman v. Nottingham*,

maintained for the reasonable protection of travelers. The omission of any railings or walls upon a bridge is culpable negligence³ and cannot be excused by showing that they would increase the liability of the bridge to destruction by floods.⁴ Where the space spanned by a bridge has been reduced, after a lapse of years, by extending the embankments from time to time into the river, such embankments are repairable as parts of the bridge.⁵

§ 394. **By whom bridges are repairable.** — In England, the repair of public bridges is, *prima facie*, a charge upon the county, as the repair of highways is a charge upon the parish.¹ In this country, bridges and highways have not been, as a general rule, treated as distinct and separate subjects of legislative provision. They are considered to be portions of the highways which pass over them,² and their maintenance is confided to the same corporate bodies or public officers, upon whom rests the duty of maintaining the highways.³ In some

49 N. H. 387; Norris v. Litchfield, 35 Id. 271; Newlin v. Davis, 77 Pa. St. 317; Houfe v. Fulton, 34 Wisc. 608; Kenworthy v. Ironston, 41 Id. 647; Grayville v. Whitaker, 85 Ill. 439; Daniels v. Athens, 55 Ga. 609; Moreland v. Mitchell county, 40 Iowa, 394; Albee v. Floyd county, 46 Id. 177.

³ Ward v. North Haven, 43 Conn. 148; Bronson v. Southbury, 37 Id. 199; Tolland v. Willington, 26 Id. 578; Palmer v. Andover, 2 Cush. 600; Hyatt v. Rondout, 44 Barb. 391; Morrell v. Peck, 88 N. Y. 398; Chicago v. Wright, 68 Ill. 586; Corbalis v. Newberry, 132 Pa. St. 9; 19 Atl. 44; Brawn v. Laurens county, 38 S. C. 282; 17 S. E. 21; Parke county v. Sappenfield, 6 Ind. App. 577; 33 N. E. 1012; Miller v. Boone county, 95 Iowa, 5; 63 N. W. 352; Loewer v. Sedalia, 77 Mo. 431; Walker v. Kansas City, 99 Id. 647; 12 S. W. 894; Teater v. Seattle, 10 Wash. St. 327; 38 Pac. 1006. See cases cited under § 356, *ante*.

⁴ Bronson v. Southbury, *supra* [want of railings "gross and culpable negligence"].

⁵ Tolland v. Willington, 26 Conn. 578; Powers v. Woodstock, 38 Vt. 44; Tyler v. Williston, 62 Id. 269; 20 Atl. 304.

¹ Rex v. Bucks, 12 East, 192. A parish or other known portion of a county may, by usage and custom, become chargeable with the repair of a bridge (Rex v. Ecclesfield, 1 Barn. & Ald. 359; Rex v. Hendon, 4 4 Barn. & Adol. 628; Rex v. Machynlleth, 2 Barn. & Cr. 166).

² Goshen v. Myers, 119 Ind. 196; 21 N. E. 657. Under a statute requiring all highways to be not less than sixteen feet wide, *all bridges* must be of the same width (Rusch v. Davenport, 6 Iowa, 443).

³ "The common-law responsibility of counties for the repair of bridges never prevailed in *New York*" (Hill v. Livingston, 12 N. Y. 52). The bridges which counties, as such, are bound to maintain are few, and form

states, the maintenance of bridges, as parts of highways, is imposed upon the towns;⁴ in other states it is imposed upon counties;⁵ and in still other states, upon independent public officers. When a bridge crosses a stream which divides two counties or towns, the duty to repair is generally imposed upon both, by the statute; and, by the common law, where such statutes do not prevail, both the towns or counties, as the case may be, are jointly and severally liable for failure to repair such bridge.⁶ But when a bridge is between two states, the authorities of each state are solely liable for the non-repair of the part of the bridge within its own boundary.⁷

§ 395. **Bridges across navigable streams.** — A bridge built without authority, across a navigable stream, is a public nuisance for which the builder or maintainer is subject to indictment,¹ and to a private action for damages.² It is said that there are three cases in which legislative authority is necessary to erect a bridge over a stream: first, where the stream is navigable; second, where the state owns the bed of the stream; and, third, where the right to take toll is desired.³ But a bridge, though built under competent authority, should be constructed and afterward maintained so as not to impede or impair the navigation of the stream.⁴ A condition, in an

exceptions, created by statutes, to the general rule. The rule that counties are not liable at common law for defects in bridges is accepted everywhere in this country (cases cited under §§ 256, 257, *ante*).

⁴ See § 258, *ante*.

⁵ See §§ 256, 257, *ante*.

⁶ See cases cited under § 345, *ante*.

When a draw-bridge is negligently managed and controlled by both a town and village, a right of action accrues against them jointly and severally (*Weisenberg v. Winneconne*, 56 Wisc. 667; *Theall v. Yonkers*, 21 Hun, 265, and for a special case, see *Day v. Day*, 94 N. Y. 153).

⁷ *Brown v. Fairhaven*, 47 Vt. 386.

¹ *Commonwealth v. Bridge Co.*, 2 Gray 339, and cases cited.

² See *Brown v. Scofield*, 8 Barb. 239;

Chenango Bridge Co. v. Lewis, 63 Id. 111. A bridge built without authority, cannot impose any obligation on the inhabitants of the town to keep it in repair (*Commonwealth v. Charlestown*, 1 Pick. 180). But after a town has availed itself of a bridge built by a county, the town cannot set up that the bridge was built across a navigable stream (*Houfe v. Fulton*, 34 Wisc. 608).

³ *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44, 63 [injunction]. In that case, defendant attempted to build a free bridge on his own land across the Mohawk river, which is only partially navigable. Held, that as the bridge did not impede or impair navigation, it was not a public nuisance.

⁴ *Hatch v. Vermont Central R. Co.*, 25 Vt. 49; *Mellen v. Western*

authority to erect a bridge over a navigable stream, that it shall not "injure, stop, or interrupt the navigation," does not apply merely to the time the bridge was built; but if, at any subsequent time, the navigation is so interrupted, the proprietors are liable for damages thereby sustained.⁵

§ 396. **Draw-bridges.**—The proprietors of a draw-bridge owe a duty to navigators to provide requisite tackle for raising the draw, and to raise the same when required by vessels desiring to pass through,¹ and to travelers upon the bridge, to guard the draw, when opened, by sufficient barriers, and lights at night, or other reasonable means.² It is no excuse for not

R. Co., 4 Gray, 301; *March v. Portsmouth, etc.*, R. Co., 19 N. H. 372; *Smith v. Milwaukee*, 18 Wisc. 62. When piles, used in the construction of a bridge, instead of being entirely removed, were cut off just below the surface of the water, so that a vessel ran on them and was injured, the builder was held liable (*Phila., etc. R. Co. v. Phila. Towboat Co.*, 23 How. U. S. 209). *s. p.*, *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643; *Steel v. Southeastern R. Co.*, 16 C. B. 550; 32 Eng. L. & Eq. 366; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112; *Van Duzer v. Elmira, etc. R. Co.*, 75 Hun, 487; 27 N. Y. Supp. 474; *Silver v. Missouri Pac. R. Co.*, 101 Mo. 79; 13 S. W. 410; *St. Louis, etc. Packet Co. v. Keokuk Bridge Co.*, 31 Fed. 755.

⁵ If the bridge, when built, is no obstruction, a change in the channel from artificial causes created by third parties cannot affect the rights of the company; otherwise if such change is the result of natural causes, influenced in their operation by the piers of the bridge. (*Dugan v. Bridge Company*, 27 Pa. St. 303). A draw-bridge over navigable water, although there must unavoidably be some delay in passing occasioned by it, is not, *per se*, such an obstruction

to navigation as to amount to a nuisance (*Works v. Junction R. Co.*, 5 McLean, C. C. 425). Plaintiff must show the circumstances which make the injury fairly chargeable to some one as a wrong (*Macomber v. Nichols*, 34 Mich. 212).

¹ *Patterson v. East Bridge Co.*, 40 Me. 404; *Davis v. Jerkins*, 5 Jones [N. C.] Law, 290; *Weisenberg v. Winneconne*, 56 Wisc. 667; 14 N. W. 871. Where a charter required "suitable" draws, the bridge company is bound to enlarge their draw, if rendered necessary for the convenient accommodation of vessels having occasion to navigate the river (*Commonwealth v. New Bedford Bridge Co.*, 2 Gray, 339). Defects in a draw-bridge were known to the vessel, which had several times passed through without injury; held not, *per se*, contributory negligence in endeavoring once more to pass through (*Crouch v. Charleston, etc. R. Co.*, 21 S. C. 495). See *Toll-bridge Co. v. Langrell*, 47 Conn. 228; *Ripley v. Freeholders*, 40 N. J. Law, 45.

² *Stephani v. Manitowoc*, 89 Wisc. 467; 62 N. W. 176; *Chicago v. Wright*, 68 Ill. 586. An open draw need not be guarded by day by an impassable barrier across the foot-path. A drop-gate lowered to with-

lighting a draw at night, that boatmen lawfully passing through it had negligently left it open.³

§ 397. **Toll-bridges.** — The proprietors of toll-bridges are not common carriers, nor subject to the severest responsibilities of such carriers: they are bound to use only ordinary care and diligence in the construction of their bridges, and in keeping them in proper order.¹ Merely giving notice to travelers of the dangerous condition of a bridge apparently safe, will not absolve the proprietors from liability, so long as they keep the bridge open and take toll.²

in two and a half feet of the floor of the bridge is sufficient. A person passing such a gate is guilty of negligence (Hart v. Hudson River Bridge Co., 84 N. Y. 56).

² Manley v. St. Helen's Canal, etc. Co., 2 Hurlst. & N. 840.

¹ Bridge Co. v. Williams, 9 Dana, 403; Orcutt v. Kittery Bridge Co., 53 Me. 500; Chase v. Cabot, etc., Bridge Co., 6 Allen, 512; Grigsby v. Chappell, 5 Rich. Law, 443; Stokes

v. Tift, 64 Ga. 312; State v. Zanesville, etc. Turnp. Co., 16 Ohio St. 308. See Stack v. Bangs, 6 Lans. 262; Rapho v. Moore, 68 Pa. St. 404; Tift v. Jones, 52 Ga. 528. In St. Louis Bridge Co. v. Miller (138 Ill. 465; 28 N. E. 1091), held that a higher degree of care was due from a toll-bridge company than from one maintaining a free bridge.

³ Randall v. Cheshire Turnpike, 6 N. H. 147. See § 387, *ante*.

CHAPTER XVIII.

CANALS.

<p>§ 398. State canals.</p> <p>399. Obligation of canal companies to navigators.</p> <p>400. Construction of canals.</p> <p>401. Maintaining bridges, locks, etc.</p>	<p>§ 402. Maintaining embankments, etc.</p> <p>403. Repair of towing-path and fencing canal.</p> <p>404. Duties of boat-owners.</p> <p>405. [Omitted.]</p>
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§ 398. **State canals.**—The duty of directing the use, and maintaining in proper repair, canals built and maintained at the expense and profit of the state, is intrusted to certain public officers, or boards of commissioners, who are personally liable for their neglect of such duty. The state, as a proprietor, is not subject, without its consent, to an action for the negligence of its officers and servants, in the management of its public works.¹

§ 399. **Obligation of canal companies to navigators.**—Private persons or corporations, who own and operate a canal which they invite the public to use upon the payment of tolls, are bound, so long as they keep it open, to exercise ordinary

¹ See §§ 249, 251, *ante*. The statute of New York, giving the right of action against the state for negligence of officers having charge of canals, is construed in *Rexford v. State*, 105 N. Y. 229; *Heacock v. State*, Id. 246; *Stewart v. State*, Id. 254; *People v. Canal Board*, 2 *Thomp. & C.* 276 [negligent excavation]; *Locke v. State*, 140 N. Y. 480; 35 N. E. 1076 [claim for negligence of servant in raising a lift bridge insufficiently high not within the statute]; *Chisholm v. State*, 141 N. Y. 246; 36 N. E. 184; *Bowen v. State*, 108 N. Y. 166; 15 N. E. 56; *Rexford v. State*, 105 N. Y. 229; 11 N. E. 514; *Silsby Manuf'g Co. v. State*, 104 N. Y. 562; 11 N. E. 264. As to personal liability of a contractor with the state to keep in repair a section of a state canal, see § 325, *ante*.

care to keep it in such repair that it may be navigated with safety,¹ but no more than ordinary care is required.²

§ 400. Construction of canals.—Where the depth or width of a canal is prescribed by statute, the proprietors are bound to maintain it at the required depth or width. Their failure to do so creates a public nuisance; and a navigator who is specially damaged by reason of the insufficient depth or width of the canal, has an action against the proprietors.¹ An improper construction of a canal basin, so that water escapes upon adjacent land, is actionable.²

§ 401. Maintenance of bridges, locks, etc.—The obligation of a canal company is not only to those who navigate its canal, or for whom it transports persons or property; but it owes a duty to the general public to see that its canal, locks, bridges, and other property are so constructed, maintained and managed, as not to cause injury to others.¹ Canal companies are

¹ In *Lancaster Canal Co. v. Parnaby* (11 Ad. & El. 223), defendant had notice of a sunken boat in its canal, but took no steps to raise it, nor to place a light near it at night; and plaintiff's boat, during the night-time, ran foul of it. Held, that, independent of defendant's charter requiring it to raise sunken boats, the common law imposed on it the duty to take reasonable care to keep it free from obstructions dangerous to the safety of navigators. The remedies given by statute against a canal company for injuries arising from the construction of dams as a part of the navigable highway, do not exclude the common-law remedies for injuries arising from an abuse of the privileges granted to the company or for the neglect of its duties (*Schuylkill Nav. Co. v. McDonough*, 33 Pa. St. 73). *s. p.*, *Hooker v. New Haven, etc. Canal Co.*, 24 Conn. 146; *Delaware, etc. Canal Co. v. Lee*, 22 N. J. Law, 243; *Weitner v. Delaware, etc. Canal Co.*, 4 Robt. 234; Penn-

sylvania R. Co. v. Patterson, 73 Pa. St. 491; *Pennsylvania Canal Co. v. Burd*, 90 Id. 281.

² Hence they are not liable for a defect of which they had no notice, *e. g.*, a stone at the bottom of the canal (*Exchange Fire Ins. Co. v. Delaware, etc. Canal Co.*, 10 Bosw. 180).

¹ *Riddle v. Proprietors of Locks & Canals, etc.*, 7 Mass. 169. See *Quincy Canal Co. v. Newcomb*, 7 Metc. 276.

² *Delaware, etc. Canal Co. v. Goldstein*, 125 Pa. St. 246; 17 Atl. 442.

¹ Where the company has pumped foul water into its canal, so as to make the canal a nuisance, it is no defense that the foulness was caused by other persons (*Attorney-General v. Bradford Navigation Co.*, 35 Law J. [Ch.], 619). In *Sipple v. State* (99 N. Y. 284), the gates of a lock in some way got open at night and a body of water flowed through, made a breach in the canal bank, and flooded plaintiff's land. Defendant

invariably required by statute to erect bridges, by which intersected highways may be carried over the canal; and sometimes they are required to maintain them in repair. In either case, they must use reasonable and ordinary care to construct such bridges on a proper plan, and with suitable materials, and to keep them afterward in a reasonably safe state of repair.² And a bridge, sufficient to accommodate the travel when it is made, must nevertheless be enlarged and improved, if necessary, to accommodate the business which in course of time comes upon the highway.³

§ 402. Maintaining embankments, etc. — Canal proprietors are bound to use only ordinary care to prevent breaks and the escape of surplus water, causing the flooding of adjacent lands.¹

held liable for negligence in leaving the lock without any one in charge.

² *Chisholm v. State*, 141 N. Y. 246; 36 N. E. 184 [dangerous hole in bridge-approach]; *Bowen v. State*, 103 N. Y. 166; 15 N. E. 56 [defective bridge-railing]; *French v. Donaldson*, 57 N. Y. 496 [contractor; rotten bridge]; *Union Canal Co. v. Pinegrove*, 6 Watts & S. 560; *Lowell v. Proprietors of Locks & Canals*, 7 Metc. 1; *Leopard v. Chesapeake, etc. Canal Co.*, 1 Gill, 222; *Gautret v. Egerton*, L. R. 2 C. P. 371. Where a company erected swing-bridges, which the boatmen were to open for the purpose of passing, and which, when opened, left the edge of the canal unprotected, it was liable for want of sufficient light or other means of preventing people falling into the canal while the bridge was lawfully opened at night-time (*Manley v. St. Helen's Canal, etc. Co.*, 2 Hurlst. & N. 840). In *Louisville, etc. Canal Co. v. Murphy* (9 Bush, 522), a canal company erected, on its own land, a bridge merely for its private use; it was not shown to have invited the public to come upon it to do business with the company

or otherwise, though the public had been permitted to use it for thirty years. Held, that so far as the public were concerned, the company owed no duty to prevent the bridge going to decay.

³ *Manley v. St. Helen's Canal, etc. Co.*, 2 Hurlst. & N. 840. Compare *Witherley v. Regent's Canal Co.*, 12 C. B. N. S. 2; *Brady v. Chicago*, 4 Biss. 448.

¹ See *Quincy Canal v. Newcomb*, 7 Metc. 276; *Morris Canal Co. v. Ryerson*, 27 N. J. Law, 457. A canal company is not liable for a mere accidental breach of their canal (*Higgins v. Chesapeake, etc. Canal Co.*, 3 Harringt. 411; *Whitehouse v. Birmingham Canal Co.* 27 Law J. [Exch.] 25). In *Hooker v. New Haven, etc. Co.* (15 Conn. 312), the banks of a canal were in imminent danger of breaking away by reason of the surplus water in the canal; the company, in order to protect the banks and to preserve the navigation, let off the water upon adjacent land through a waste-weir. Held, the land-owner might recover his damages, although the discharging of the water was done prudently, and in a manner to

Some nice questions have arisen between canal proprietors and the owners of adjacent water-power, or lessees of surplus water, as to the use of such surplus water. In general, the canal proprietors have no right to use more water than is necessary for the proper operation of their works; and if they improperly take away any part of the water to which another has a right, they will be liable for the consequent damage.²

§ 403. Repair of towing-path, and fencing canal.—The towing-path of a canal is a public highway, but only for the purposes for which it was made.¹ The proprietors of the canal owe no duty to persons other than navigators, to keep it in repair, except, possibly, where they have appropriated a part of the public highway for their use as such. Nor are they under any general obligation to fence the canal. Hence, where a canal was constructed by the side of a public footway, at a distance of several feet from the towing-path, but the distinction between the footway and towing-path had become obliterated, and the public had been permitted to travel on the intermediate space without objection, a traveler on the footway who left it and fell into the unfenced canal, was held to have no remedy against the proprietors.²

§ 404. Duties of boat-owners.—Persons navigating a canal are bound to the use of ordinary care in equipping and man-

do as little damage as possible. But in such a case, the act complained of being done for the protection of the defendant's own property, the question of negligence would not arise, except possibly on the question of damages. Twenty years' user of opening in bank, with occasional overflow, held, not to give prescriptive right to increase such overflow (*Savannah, etc. Co. v. Bourquin*, 51 Ga. 378). The proprietors of an irrigating ditch, during an extraordinary flood, in order to save the ditch, cut one of its embankments and turned its waters upon adjacent cultivated lands, where there was no

natural water-course to carry them away. Held, the proprietor could not justify the trespass on the ground that it was the act of God; the storm might have been; but the cutting of the embankment was not (*Turner v. Tuolumne Water Co.*, 25 Cal. 397).

² *Lynch v. Stone*, 4 Denio, 356.

¹ *Rex v. Severn, etc. R. Co.*, 2 Barn. & Ald. 646, 648, per Bayley, J. See cases in note 5, § 333, *ante*.

² *Binks v. South Yorkshire R., etc. Co.*, 3 Best & S. 244. See *Hardcastle v. South Yorkshire R., etc. Co.*, 4 Hurlst. & N. 67.

aging their boats, so as not to injure others,¹ *e. g.*, keeping their boats in such condition that the tow-ropes of other boats can freely pass under them. But the mere fact that a keel was not in good order for this purpose, is not sufficient evidence of negligence.² It is not negligence for the owner of a boat laid up in winter quarters to leave her hatches off without protection, so that a person coming on the boat fell into them.³

§ 405. [omitted.]

¹ Case v. Perew, 46 Hun, 57 [collision].

³ Caniff v. Blanchard Nav. Co., 66 Mich. 638; 33 N. W. 744. S. P.,

² Sherman v. Western Transp. Co., 62 Barb. 150. Anderson v. Scully, 31 Fed. 161.

CHAPTER XIX.

CONSTRUCTION AND MAINTENANCE OF RAILROADS.*

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| <p>§ 406. Track, road-bed, bridges, etc.</p> <p>407. What dangers must be provided against.</p> <p>408. Railroads on highways.</p> <p>409. [Omitted.]</p> <p>410. Accessories of railroads.</p> <p>411. [Omitted.]</p> <p>412. Rights of compensated land-owners.</p> | <p>§ 413. Obligations of lessor or lessee.</p> <p>414. Interference with highway.</p> <p>415. Restoration of roads and bridges.</p> <p>416. Road-bridges over railroads.</p> <p>417. Highway crossing at level.</p> <p>417a. Other crossings at level.</p> |
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§ 406. Track, road-bed, bridges, etc. — A railroad company is bound to use ordinary care for the purpose of laying its track, road-bed and bridges in such manner, and keeping them in such condition, as to make the road safe for all persons having a right to pass over or under it, to be upon it, or to have their property thereon,¹ and it is bound to use great care

¹ The duty to keep a road in sufficient repair is a condition attendant upon the grant of the franchise, which, from its very nature, inures to the benefit of all who may have occasion to use the thoroughfare (*Cumberland Valley R. Co. v. Hughes*, 11 Pa. St. 141). Hence it is negligence not to clear away trees which by falling will obstruct its road (*Texas, etc. R. Co. v. Vallie*, 60 Tex. 481); or to allow a telegraph pole to stand for three years within 18 inches of a side-track (*Chicago, etc. R. Co. v. Russell*, 91 Ill. 298); or to allow coal-bins dangerously close to its track (*Dickinson v. Port Huron, etc. R. Co.*, 53 Mich. 43; 18 N. W. 553); or to allow a cattle chute or other structure to stand too near the track (*Allen v. Burlington, etc. R. Co.*, 64 Iowa, 94; 19 N. W. 870; *Whalen v. Illinois, etc. R. Co.*, 16 Bradw. 320); or to allow obstructions to remain on the track (*Tinker v. N. Y. Ontario, etc. R. Co.*, 71 Hun, 431; 24 N. Y. Supp. 977). But the company is not liable for the proximity of a structure which it has no right to remove (*Barber v. Richmond, etc. R. Co.*, 34 S. C. 444; 13 S. E. 630). Plaintiff could recover for foot being caught between rails and planks (*Spooner v. Delaware, etc. R. Co.*, 115 N. Y. 22; 21 N. E. 696).

* We purposely omit the subject of damage to abutting owners, as not governed by the law of negligence.

in these respects, for the protection of its passengers.² Where it has regular crossings, it ought to provide lights at night, so as to prevent travelers from stumbling over obstacles;³ and, though it is not in general bound to light any portion of the track not assigned for crossings,⁴ yet it must light every part which is so used with its consent;⁵ and make it reasonably safe and easy for the passage of men and animals.⁶ Bridges must be so built as to allow free passage of water and ice.⁷ Side-tracks are not required to be constructed or maintained with as high a degree of care as main tracks.⁸

§ 407. What dangers must be provided against.—A railroad company is, however, only bound to provide against dangers which can reasonably be foreseen;¹ and it is not guilty of

² As to the general rights of passengers in this respect, see *Great Western R. Co. v. Braid*, 1 Moore P. C. N. S. 101. The company cannot exonerate itself from this responsibility by the employment of a competent and careful person to build the road. If the road is not in fact carefully built, the company's liability remains (*Grote v. Chester, etc. Co.*, 2 Exch. 251; *Virginia, etc. R. Co. v. Sanger*, 15 Gratt. 230). The same rules apply, of course, to bridges, as to the ordinary track (*Bogart v. Delaware, etc. R. Co.*, 145 N. Y. 283; 40 N. E. 17; *Covington v. United States, etc. R. Co.*, 8 N. Y. App. Div. 223; 40 N. Y. Supp. 313 [bridge piers insufficient to let ice through]; *Carlson v. Oregon, etc. R. Co.*, 21 Oreg. 450; 28 Pac. 497). As to the degree of care required, see §§ 495, 499, *post*.

³ *Nicholson v. Lancashire, etc. R. Co.*, 3 Hurlst. & C. 534 [passenger]. See *post*, § 417.

⁴ A person crossing a railway at a part where there was no foot path, and which was unlighted, fell into a hole and dislocated his shoulder. Held, the company was not bound to light the line at that place where

there was no recognized footpath (*Paddock v. Northeastern R. Co.*, 16 Law Times [N. S.], 639).

⁵ *Nicholson v. Lancashire, etc. R. Co.*, *supra*.

⁶ So held, on injury to a horse at a crossing, caused by planks being placed too far from rails (*Mann v. Vermont Cent. R. Co.*, 55 Vt. 484).

⁷ *Omaha, etc. R. Co. v. Standen*, 22 Neb. 343; 35 N. W. 183.

⁸ *O'Donnell v. Duluth, etc. R. Co.*, 89 Mich. 174; 50 N. W. 801; *Ragon v. Toledo, etc. R. Co.*, 97 Mich. 265; 53 N. W. 612.

¹ *Bramwell, B., Cornman v. Eastern Cos. R. Co.*, 4 Hurlst. & N. 781, 786; see *Tyrrell v. Eastern R. Co.*, 111 Mass. 546; *Pershing v. Chicago, etc. R. Co.*, 71 Iowa, 561; 32 N. W. 488. See §§ 16-18, *ante*. Maintaining a cut with sides in such a condition that a landslide occurs, though the immediate cause of the accident was vibration produced by a train passing through the cut is negligence (*Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435; 11 S. Ct. 859). *s. p.*, *Bonner v. Wingate*, 78 Tex. 333; 14 S. W. 790 [washout at culvert negligently constructed]; *Bonner v. Mayfield*, 82 Tex. 234; 18 S. W. 305.

culpable negligence in not securing against events which could not be anticipated by reasonable men of the ordinary sagacity required in the business, such, for example, as an extraordinary flood² or frost.³ But dangers which might reasonably be expected to occur, though rarely, must be guarded against, including unusual storms, which might well be anticipated.⁴ Breaks in the embankment of a railroad are the probable result of great freshets; and the failure to guard against them, by immediate inspection after such freshets, is negligence.⁵ Provision must be made against dangers likely to arise from severe frosts, such as have before occurred in that section.⁶ The rule

² Withers v. North Kent R. Co., 27 L. J. [Exch.] 417; 3 Hurlst. & N. 969. In that case, it was shown that the railroad was laid on an embankment built of sandy soil, in a marshy country subject to floods, and that the culverts were insufficient at times to carry off the water. But it did not appear that the embankment had ever been affected by floods, although it had been in use for five years, until the night upon which the plaintiff was traveling, in which an extraordinary flood had carried away the soil from under the track, and the cars were thrown off. Held, no evidence of negligence. *S. P.*, Central Trust Co. v. Wabash, etc. R. Co., 57 Fed. 441 [unprecedented flood]; Libby v. Maine Cent. R. Co., 85 Me. 34; 26 Atl. 943 [no such flood for fifty years]. In Pittsburgh, etc. R. Co. v. Gilleland (56 Pa. St. 445), it was held that a railroad company was not bound to provide culverts sufficient to pass *extraordinary* floods, although not *unprecedented*. *S. P.*, Houston, etc. R. Co. v. Parker, 50 Tex. 330; Philadelphia, etc. R. Co. v. Davis, 68 Md. 281; 11 Atl. 822; Han-naher v. St. Paul, etc. R. Co., 5 Dak. 1; 37 N. W. 717; Stoher v. St. Louis, etc. R. Co., 91 Mo. 509; 4 S. W. 389.

³ See Blyth v. Birmingham Water-works Co., 11 Exch. 781.

⁴ Railroads must be prepared for any storm, not so extraordinary that no experience could have anticipated its occurrence (Great Western R. Co. v. Braid, 1 Moore P. C., N. S. 101; Mundy v. N. Y., Lake Erie, etc. R. Co., 75 Hun, 479; 27 N. Y. Supp. 469; Kansas City, etc. R. Co. v. Cook, 57 Ark. 387; 21 S. W. 1066; Gulf, etc. R. Co. v. Pomeroy, 67 Tex. 498; 3 S. W. 722; Illinois Cent. R. Co. v. Heisner, 45 Ill. App. 143).

⁵ Hardy v. North Carolina Cent. R. Co. 74 N. C. 734 [servant recovered]. To same effect, Libby v. Maine Cent. R. Co., 85 Me. 34; 26 Atl. 943. An immediate and careful inspection of the road-bed, after a violent storm, will relieve the company from liability, even though it does not discover the defect (International, etc. R. Co. v. Halloren, 53 Tex. 46). If a railroad is located in the channel of a stream, it is negligence not to construct it of such materials that it will withstand the violent action of water; freshets must be anticipated (Kansas Pac. R. Co. v. Lundin, 3 Colo. 94). And if insufficiently drained, the fact of an unprecedented storm will not avail (Philadelphia, etc. R. Co. v. Anderson, 94 Pa. St. 351, 360).

⁶ Griveaud v. St. Louis Cable, etc. R. Co., 33 Mo. App. 458.

which entitles municipal corporations to notice of defects has not the same application to railroad companies; the latter are not entitled to notice of patent⁷ defects; but they are not liable for latent⁸ defects, to those with whom they have no contractual relations, unless they have had either express or implied notice of them.

§ 408. Railroads on highways. — In laying a railroad upon a public highway, ordinary care and skill must be used to make the track harmless to persons, animals or vehicles passing along the highway;¹ and it may not be enough that the track is laid just as it is on land belonging to the company. As in other cases, the degree of care and skill required is to be estimated in view of the whole circumstances, taking into account the obvious risks of danger to travelers, and the necessity of caution to avoid numerous injuries.² Thus the rails ought not to be so laid as to entangle the feet

¹ *Worster v. Forty-second St. R. Co.*, 50 N. Y. 203.

⁸ Where a car door fell upon a bystander as the train was passing him on the street of a city, the company was held not liable, there being no direct evidence how the door happened to fall (*Case v. Chicago, etc. R. Co.*, 64 Iowa, 762; 21 N. W. 30). Where bars were left down by a stranger, it did not appear when, and a horse passed through to the track and was killed, the company was held not liable, though the statute required it to keep the track fenced. The court said: "The essential fact wanting in the plaintiff's case is the proof that *defendant knew the bars were down and neglected to put them up*" (*Aylesworth v. Chicago, etc. R. Co.*, 30 Iowa, 459; *Perry v. Dubuque, etc. R. Co.*, 36 Id. 102; *Davis v. Chicago, etc. R. Co.*, 40 Id. 292). Constructive notice is enough (see *Van Duzer v. Elmira, etc. R. Co.*, 75 Hun, 487; 27 N. Y. Supp. 474); but must be proved (*Gulf, etc. R. Co. v. Taylor, Tex. Civ. App.*; 31 S. W. 214).

¹ *Worster v. Forty-second St. R. Co.*, 50 N. Y. 203; *Mazetti v. Harlem R. Co.*, 3 E. D. Smith, 98; *Fash v. Third Av. R. Co.*, 1 Daly, 148; see *McClain v. Brooklyn R. Co.*, 116 N. Y. 459; 22 N. E. 1062. The company is negligent in willingly allowing a dangerous hole to remain between its tracks, though such hole were made by the city through which the road passes (*Oakland R. Co. v. Fielding*, 48 Pa. St. 320); see § 342, *ante*. It is not enough to prove that all was done that was required by the charter and the city ordinance (*Cleveland v. Bangor St. R.*, 86 Me. 232; 29 Atl. 1005 [electric pole]). But the company is not liable for a defect which it did not cause and was not allowed to remove (*Snell v. Rochester R. Co.*, 64 Hun. 476; 19 N. Y. Supp. 496.)

² *Mazetti v. Harlem R. Co.*, 3 E. D. Smith, 98; *Georgia R. Co. v. Mayo*, 92 Ga. 223; 17 S. E. 1000; *Brown v. Hannibal, etc. R. Co.*, 99 Mo. 310; 12 S. W. 655; *Houston St. R. Co. v. Autrey*, 4 Tex. Civ. App. 635; 23 S. W. 817.

of men or horses;³ nor should the rails be raised so much above the level of the highway that persons or wagons cannot conveniently pass over them;⁴ nor should snow or dirt be cleared from the track in such manner as to obstruct traffic upon the highway.⁵ The construction and use of a running switch on a highway, in the midst of a populous town or village, is of itself an act of gross negligence. Any person who, without negligence on his part, is injured by the operation of a running switch, so situated, may recover for the damages sustained, without other proof of negligence than the existence of the switch.⁶ The track must be kept in good

³ *Mazetti v. Harlem R. Co.*, *supra*. And see *Pittsburgh, etc. R. Co. v. Dunn*, 56 Pa. St. 280. Where too broad a space was left between the rail and a plank placed beside it to facilitate the crossing of teams, the company was held liable to the owner of a horse which wrenched off its hoof (*Cuddeback v. Jewett*, 20 Hun, 187). See also the similar cases of *Baughman v. Shenango, etc. R. Co.* (92 Pa. St. 355), and *Central R. etc. Co. v. Gleason* (69 Ga. 200). s. p., as to the foot of a person (*Elgin, etc. R. Co. v. Raymond*, 148 Ill. 241; 35 N. E. 729).

⁴ *Wooley v. Grand St. R. Co.*, 83 N. Y. 121; *Milwaukee, etc. R. Co. v. Hunter*, 11 Wisc. 160; *Mayes v. Chicago, etc. R. Co.*, 63 Iowa, 562; *Wasmer v. Delaware, etc. R. Co.*, 80 N. Y. 212 [4½ inches]; *Schild v. Central Park, etc. R. Co.*, 133 N. Y. 446; 31 N. E. 327 [8 inches]; *Evansville, etc. R. Co. v. Carvener*, 113 Ind. 51; 14 N. E. 738 [9 inches]; *Baumgartner v. Mankato*, 60 Minn. 244; 63 N. W. 127 [several inches]; *Evansville, etc. R. Co. v. Crist*, 116 Ind. 446; 19 N. E. 310; *Greeley v. Federal St. etc. R. Co.*, 153 Pa. St. 218; 25 Atl. 796 [two feet *below* level]. It cannot be said, as a matter of law, that a railroad crossing where the rails are an inch higher than the planking and cinder beds forming

the roadway is not defective (*McDermott v. Chicago, etc. R. Co.*, 91 Wisc. 38; 64 N. W. 430). The mere fact that a railroad track is laid at grade with the street is not negligence (*Chicago, etc. R. Co. v. White*, 46 Ill. App. 446; compare *McKillop v. Duluth St. R. Co.*, 53 Minn. 532; 55 N. W. 739). In England, a company is made to pay all damages caused by the projection of its rails above the surface (*Oliver v. North East R. Co.*, L. R. 9 Q. B. 409), and must not at all interfere with the usefulness and safety of the highways which it intersects (see *Rex v. Kerrison*, 3 M. & S. 527).

⁵ A street railway company removed snow from its track and left it in ridges on either side for three days; plaintiff, in attempting to turn out to avoid a car, was upset and his horses ran away; held, company liable (*Bowen v. Detroit R. Co.*, 54 Mich. 496). See § 342, *ante*. Not so, where the snow from a track had been removed with due care (*Ovington v. Lowell, etc. R. Co.*, 163 Mass. 440; 40 N. E. 767).

⁶ *Brown v. N. Y. Central R. Co.*, 32 N. Y., 597; *Illinois Central R. Co. v. Baches*, 55 Ill. 379. To same effect, *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wisc. 145; *Butter v. Milwaukee, etc. R. Co.*, 28 Id. 487.

condition, as far as by the use of ordinary care it can be done;⁷ and the failure of the town to repair the highway upon which a railroad is laid, even though it is bound to do so, is no excuse to the company for letting its track fall out of repair.⁸ Nor is the approval of the track by any public officer a defense to an action upon injuries caused by its defects.⁹ But a railroad company, if legally authorized to lay its track upon a highway, is liable only for its negligence in performing or maintaining the work, and cannot be made responsible for injuries unavoidably resulting from the presence of the rails upon the highway.¹⁰

§ 409. [Omitted.]

§ 410. **Accessories of railroads.** — The obligation of ordinary care on the part of a railroad company extends, of course, to all the accessories of its business, as well as to the track itself. It should have such locomotives,¹ cars,² coup-

⁷ *Worster v. Forty-second St. R. Co.*, 50 N. Y. 203; *Fash v. Third Ave. R. Co.*, 1 Daly, 148. This last case has been questioned on the ground that the company was made to answer for the neglect of the municipal corporation (*Lowery v. Brooklyn, etc. R. Co.*, 76 N. Y. 28, 31). The company is, however, responsible for an accident caused by the improper laying of a rail, even though the municipal authorities be negligent to the same extent in improperly paving the street (*Carpenter v. Central Park, etc. R. Co.*, 11 Abb. N. S. 416).

⁸ *Gillett v. Western R. Co.*, 8 Allen, 560; *Carpenter v. Central Park, etc. R. Co.*, 11 Abb. N. S. 416, and cases, *supra*. And if a company is under contract with such town or city to keep a portion of its streets in repair, it is directly liable to persons injured by its failure to perform, though the town or city also be liable (*Brooklyn v. Brooklyn R. Co.*, 47 N. Y. 475; *McMahon v. Second Ave. R. Co.*, 75 Id. 231). This liability of the company does not,

however, relieve the town from its primary liability (*Hawks v. Northampton*, 116 Mass. 420; *Johnson v. Salem Turnpike Co.*, 109 Id. 522). See § 345, *ante*.

⁹ *Delzell v. Indianapolis R. Co.*, 32 Ind. 45; *Alton, etc. R. Co. v. Deitz*, 50 Ill. 210. See *Dominguez v. Orleans R. Co.*, 35 La. Ann. 751. S. P., *Houston R. Co. v. Richart*, 87 Tex. 539; 27 S. W. 920.

¹⁰ See *Mazetti v. Harlem R. Co.*, 3 E. D. Smith, 98.

¹ See *Illinois Central R. Co. v. Phillips*, 55 Ill. 194; *Central Trust Co. v. Wabash, etc. R. Co.*, 26 Fed. 897; *Atchison, etc. R. Co. v. Campbell*, 16 Kans. 200 [spark arresters]; *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61; 12 S. W. 838 [sloping tank on switch engine].

² In New York, Massachusetts, and perhaps other states, recent statutes forbid the use in passenger, mail or baggage cars, of a common stove for heating purposes. A company is responsible for the defective cars of another company, which it allows to come upon its line or

lings,³ brakes,⁴ switches,⁵ turn-tables,⁶ platforms,⁷ etc., as are least likely to do injury, while sufficient for the requirements of

grounds (Chicago, etc. R. Co. v. Avery, 109 Ill. 314; Guttridge v. Missouri Pac. R. Co., 94 Mo. 468; 7 S. W. 476). See Walsh v. New York, etc. R. Co., 160 Mass. 571; 36 N. E. 584; Chicago, etc. R. Co. v. Meech, 59 Ill. App. 69; Illinois Cent. R. Co. v. Price, 72 Miss. 862; 18 So. 415; Louisville, etc. R. Co. v. Reagan, 96 Tenn. 128; 33 S. W. 1050. The fact that defendant's cars were not provided with fenders to prevent objects from getting under the wheels does not constitute negligence (Pitcher v. People's R. Co., 174 Pa. St. 402; 34 Atl. 567).

³ All coupling attachments must be kept as safe as they can be by careful inspection (Fay v. Minneapolis, etc. R. Co., 30 Minn. 231; King v. Ohio, etc. R. Co., 14 Fed. 277). The buffers between the cars must not overlap (Ellis v. N. Y., Lake Erie, etc. R. Co., 95 N. Y. 546). Compare Simms v. So. Carolina R. Co., 26 S. C. 90; 2 S. E. 486; Illinois Cent. R. Co. v. O'Connell, 160 Ill. 636; 43 N. E. 704 [projection of car-platform]. In New York since July 1, 1886, automatic couplings must be used on freight cars (L. 1884, ch. 439, § 4; L. 1890, ch. 565, § 49, subd. 4).

⁴ Owen v. Hudson Riv. R. Co., 7 Bosw. 329; Oldfield v. Harlem R. Co., 3 E. D. Smith, 103; see S. C., 14 N. Y. 310; also Hegeman v. Western R. Corp. 13 Id. 9, as to sufficient car axles. The brakes must not be allowed to become so worn that they will not remain wound up (Ransier v. Minneapolis, etc. R. Co., 32 Minn. 331; Johnson v. Gulf, etc. R. Co., 2 Tex. Civ. App. 139; 21 N. W. 274 [hand car brakes]; and the car lad-

ders must have sound handles (Richmond, etc. R. Co. v. Moore, 78 Va. 93; Chicago, etc. R. Co. v. Warner, 108 Ill. 538; see Brann v. Chicago, etc. R. Co., 53 Iowa, 595; 6 N. W. 5). S. P., Musser v. Lancaster St. R. Co., 176 Pa. St. 621; 35 Atl. 206 [breaking of cable preventing stopping of car on steep incline]. An electric street railway is not required to have in use the latest improvements devised to prevent collision with vehicles and pedestrians, but only to use reasonable care to avail itself of new inventions and improvements known to it (Richmond R. Co. v. Garthright, 92 Va. 627; 24 S. E. 267 [defective trolley-wire]). The fact that the train was not equipped with air brakes is not ground for recovery, when it appears that even by the aid of such brakes the train could not have been stopped in time to avoid the accident (Chicago, B. etc. R. Co. v. Grablin, 38 Neb. 90; 56 N. W. 796; 57 Id. 522).

⁵ The best switches must be used (Smith v. Harlem R. Co., 19 N. Y. 127; aff'g 6 Duer, 225), and kept in good condition (Wooley v. Grand St. R. Co., 83 N. Y. 121). In New York, it is required by the general railroad law, that such switches be used as will prevent the derailment of a train in case of their misplacement. As to duty to guard switches from unlawful interference, see East Tennessee, etc. R. Co. v. Kane, 92 Ga. 187; 18 S. E. 18. As to duty to provide a target on a switch, see St. Louis, etc. R. Co. v. Needham, 16 C. C. A. 457; 69 Fed. 823.

⁶ See cases cited under § 73, *ante*; also Houston, etc. R. Co. v. Simpson,

⁷ Cornman v. Eastern Counties R. Co., 4 Hurlst. & N. 787; Kelley v.

Manhattan R. Co., 112 N. Y. 443; 20 N. E. 383; Reid v. N. Y., New Haven.

its business. So its stations or depots should be built and arranged with care, properly lighted when dark,⁸ so long as business is transacted, and otherwise made safe and convenient for persons lawfully entering therein for the transaction of business,⁹ or under any actual or implied invitation.¹⁰ As to such persons, it is bound to use ordinary care.¹¹ As to mere idlers or trespassers, a railroad company is only liable

60 Tex. 103; Kansas Cent. R. Co. v. Fitzsimmons, 23 Kans. 686; St. Louis, etc. R. Co. v. Bell, 81 Ill. 76; Koons v. St. Louis, etc. R. Co., 65 Mo. 592. And custom is no defense if it disregards the safety of human life or limb (Ilwaco R. Co. v. Hedrick, 1

Wash. St. 446; 25 Pac. 335; Allen v. Burlington, etc. R. Co., 64 Iowa, 94; see Koons v. St. Louis, etc. R. Co., 65 Mo. 592; compare Bridger v. Asheville, etc. R. Co., 27 S. C. 456; 3 S. E. 860).

etc. R. Co., 63 Hun, 630, *mem.*; 17 N. Y. Supp. 801; Tobin v. Portland, etc. R. Co., 59 Me. 183; Louisville, etc. R. Co. v. Wolfe, 80 Ky. 82; Louisville, etc. R. Co. v. Cockerel, Ky. ; 33 S. W. 407; Louis-

ville, etc. R. Co. v. Lucas, 119 Ind. 583; 21 N. E. 968; Schneekloth v. Chicago, etc. R. Co., Mich. ; 65 N. W. 663 [flag-station]; Kincaid v. Kansas City etc. R. Co., 1 Mo. App. 543.

⁸ Martin v. Great Northern R. Co. 16 C. B. 179. In Cornman v. Eastern Cos. R. Co. (4 Hurlst. & N. 781, 784), Watson, B., expressed the opinion that this was the only ground upon which that case could be supported. Company is only required to use ordinary and reasonable care in lighting its depot platform (Hiatt v. Des Moines, etc. R. Co., 96 Iowa, 169; 64 N. W. 766).

⁹ Danville, etc. R. Co. v. Brown, 90 Va. 340; 13 S. E. 278; Galloway v. Chicago, etc. R. Co., 56 Minn. 346; 57 N. W. 1058; Christie v. Chicago, etc. R. Co., 61 Minn. 161; 63 N. W. 482; Pittsburg, etc. R. Co. v. Ives, 12 Ind. App. 602; 40 N. E. 923. In consequence of there being no bunter, or other obstruction, at the end of a spur track, cars ran off the end of the track, and, striking a telegraph pole, loosened the wires attached to the pole so that they fell

down on plaintiff's horses, causing them to run away. Held, a question for the jury whether the failure to put up a bunter, or other obstruction, at the end of the track was negligence (Shaw v. New York, etc. R. Co., 150 Mass. 182; 22 N. E. 884).

¹⁰ Pennsylvania Co. v. Marion, 104 Ind. 239; 3 N. E. 874; Dempsey v. N. Y. Central R. Co., 81 Hun, 156; 30 N. Y. Supp. 724; Hall v. Texas, etc. R. Co., 12 Tex. Civ. App. 11; 35 S. W. 321. To the same effect, Favor v. Boston, etc. R. Co., 114 Mass. 350; Flint v. Norwich, etc. R. Co., 110 Id. 222; Whitney v. Maine Central R. Co., 69 Me. 208; Beatty v. Central Iowa R. Co., 58 Iowa, 242; Hahn v. So. Pacific R. Co., 51 Cal. 605.

¹¹ Union Pac. R. Co. v. O'Brien, 161 U. S. 451; 16 S. Ct. 618; McCabe v. Chicago, etc. R. Co., 88 Wisc. 531; 60 N. W. 260; and preceding cases.

for gross negligence or something in the nature of a trap.¹² The company has a right to reserve any part of its buildings for its own use; and, having indicated that it has done so, in a manner sufficient to warn persons using ordinary care that they have no business there, it is not bound to keep such places in a condition which will make it safe for any person, other than its own servants, to enter.¹³ It is no excuse to show that defects in a structure, actually used by the company, were due to the fault of some one else.¹⁴

§ 411. [Omitted.]

§ 412. Rights of compensated land-owners.—The compensation which a land-owner receives for the right of way through his property is measured upon the assumption that the railroad will be constructed and managed with ordinary care; and if he suffers from the want of such care on the part of the railroad company, he is not debarred from recovery therefor by his receipt of compensation for his land.¹ So it is assumed

¹² Company held liable to a spectator for gross negligence (Illinois Cent. R. Co. v. Wall, 53 Ill. App. 588); but for nothing less (Burbank v. Illinois Cent. R. Co., 42 La. Ann. 1156; 8 So. 580; see Post v. Texas, etc. R. Co., Tex. Civ. App. ; 23 S. W. 708). A person coming on the platform for mere curiosity cannot recover for injuries sustained by its fall, upon mere proof of its insufficiency to bear a large number of persons (Gillis v. Pennsylvania R. Co., 59 Pa. St. 129). A statute requiring railway companies to block "frogs" does not render them liable to a trespasser for a failure to comply therewith (Akers v. Chicago, etc. R. Co., 58 Minn. 540; 60 N. W. 669). As to limits of obligation to protect trespassing children against injuries from turntables (Walsh v. Fitchburg R. Co., 145 N. Y. 301; 39 N. E. 1068).

¹³ Sweeny v. Old Colony R. Co., 10 Allen, 368; Toomey v. Brighton,

etc. R. Co., 3 C. B. N. S. 146. Where a passenger walked, uninjured and without necessity, under a heavy package, while it was being hoisted by a crane, which broke, it was held that the company owed him no duty in respect to the crane, having no reason to expect that people would pass under it (Griffiths v. Northwestern R. Co., 14 Law Times, N. S. 797).

¹⁴ Beard v. Conn. R. Co., 48 Vt. 101.

¹ Waterman v. Connecticut, etc. R. Co., 30 Vt. 610; Pittsburgh, etc. R. Co. v. Gilleland, 56 Pa. St. 445; Koppf v. Northern Pac. R. Co., 41 Minn. 310; 43 N. W. 73. So held, in cases of negligently flooding land (Mellen v. Western R. Co., 4 Gray, 301; Johnson v. Atlantic, etc. R. Co., 35 N. H. 569; Jacksonville, etc. R. Co. v. Cox, 91 Ill. 500; St. Louis, etc. R. v. Harris, 47 Ark. 340; 1 S. W. 609; Yazoo, etc. R. Co. v. Davis, 73 Miss. 678; 19 So. 487). So

that the company will promptly remove from adjoining land any thing that in the course of construction falls there (as, for example, fragments of rock driven out in blasting); and for its failure to do so an action lies, irrespective of the compensation awarded for the land taken and damage necessarily to be suffered.² But for injuries which naturally follow the use of the land for the purpose of a railroad, and which could not be avoided by the use of ordinary care, a compensated land-owner cannot recover.³ The company may use the whole of its land for its authorized purposes; and it is under no obligation to lay its tracks or run its trains at any distance from adjoining property.⁴

§ 413. Obligations of lessor or lessee of railroad.—

Under the well-settled rule, that no covenants as to the condition of the property are implied in a lease of real estate, the obligations mentioned in this chapter do not bind a railroad company in favor of a lessee of the road, and the latter must take the road as he finds it.¹ It follows that passengers and

as to destruction of fence (*Chatanooga, etc. R. Co. v. Brown*, 84 Ga. 256; 10 S. E. 730). It is not necessary to prove malice (*McCormick v. Kansas City, etc. R. Co.*, 57 Mo. 433).

² *Sabin v. Vermont Central R. Co.*, 25 Vt. 363.

³ Such compulsory damage will not lay the foundation of an action in any form, as it should be taken into account in estimating the compensation for land taken. So held, under compulsory taking (*Brown v. Providence, etc. R. Co.*, 5 Gray, 35; *Missouri Pac. R. Co. v. Renfro*, 52 Kans. 237; 34 Pac. 802); or is conveyed by voluntary deed (*Rood v. N. Y. & Erie R. Co.*, 18 Barb. 80; *Stewart v. Cincinnati, etc. R. Co.*, 80 Mich. 166; 44 N. W. 1116; *St. Louis, etc. R. Co. v. Walbrink*, 47 Ark. 330; 1 S. W. 545; *Hodge v. Lehigh Val. R. Co.*, 39 Fed. 449 [flooding land]; *Egener v. N. Y. & Rockaway Beach R. Co.*, 3 N. Y. App. Div. 1; 38 N. Y. Supp. 319 [same];

Hannah v. St. Paul, etc. R. Co., 5 Dak. 1; 37 N. W. 717; *Hortsmann v. Covington, etc. R. Co.*, 18 B. Monr. 218; but compare *Richardson v. Vermont Central R. Co.*, 25 Vt. 465). If embankments are necessary, and they cannot by ordinary care be prevented from flooding adjoining land, the land-owner cannot complain (*Terre Haute, etc. R. Co. v. McKinley*, 33 Ind. 274; *Collier v. Chicago, etc. R. Co.*, 48 Mo. App. 398).

⁴ *Flinn v. N. Y. Central R. Co.*, 58 Hun, 230; 12 N. Y. Supp. 341.

¹ *Murch v. Concord R. Co.*, 29 N. H. 9. A lessor of a railroad is not liable for damages to land adjacent to the railroad land, caused by an embankment erected by the lessee in filling in a trestle, where the lessor was not bound to build such embankment, it not appearing that the trestle was not sufficient at the time of the lease, or that it was then a nuisance, though the lessor was bound by the lease to pay the lessee

others, deriving their rights from the lessee, cannot hold the lessor responsible for any defects in the condition of the road, because there exists no contract or duty between them.² But, to relieve the lessor from liability, the possession of the lessee must be authorized by statute³ and must be exclusive. If the road is operated on the joint account of lessees of a part of it and the owner [or a receiver] of the remaining part, and the servant by whose negligence the injury was done, was employed by them jointly, both the owner and the lessee are liable; for the servant was as much the agent of the one as of the other.⁴ So the fact that a company grants the joint

for any work chargeable to construction (*Miller v. N. Y., Lake Erie, etc. R. Co.*, 125 N. Y. 118; 26 N. E. 35).

² *Murch v. Concord R. Co.*, *supra*; *Mahoney v. Atlantic, etc. R. Co.*, 63 Me. 68. One railroad company allowed another to lay a track on a bridge erected by the former. Held, not liable to a stranger for an injury caused by defects created in the bridge by the negligence of the other company (*Gwathney v. Little Miami R. Co.*, 12 Ohio St. 92). *s. p.*, *Wood v. Locke*, 147 Mass. 604; 18 N. E. 578 [defective frog; lessor not liable to lessee's employee]; *Virginia M. R. Co. v. Washington*, 86 Va., 629; 10 S. E. 927 [same]; *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 165 [same]. A railroad is bound to keep its road, track, and yards in a reasonably safe condition for its employees, and it cannot avoid liability by letting out a part of its duties as a common carrier to an independent contractor (*Burns v. Kansas City, etc. R. Co.*, 129 Mo. 41; 31 S. W. 347; *Trinity, etc. R. Co. v. Lane*, 79 Tex. 643; 15 S. W. 477).

³ See cases cited in note 1, § 120*a*, *ante*, and, in addition, *Durfee v. Johnstown, R. Co.*, 71 Hun, 279; 24 N. Y. Supp. 1016; *Von Steuben v. Central R. Co.*, 4 Pa. Dist. R. 153;

Baltimore, etc. R. Co. v. Paul, 143 Ind. 23; 40 N. E. 519; *Logan v. North Carolina R. Co.*, 116 N. C. 940; 21 S. E. 959; *Bouknight v. Charlotte, etc. R. Co.*, 41 S. C. 415; 19 S. E. 915; *Ft. Worth R. Co. v. Furguson*, 9 Tex. Civ. App. 610; 29 S. W. 61; *Galveston, etc. R. Co. v. Garteiser*, 9 Tex. Civ. App. 456; 29 S. W. 939; *Lakin v. Willamette Val. etc. R. Co.*, 13 Oreg. 436; 11 Pac. 68.

⁴ *Railroad Company v. Brown*, 17 Wall. 445. As to liability of receivers in possession of, and operating, a railroad, see cases cited under 120*a*, *ante*; also *Meara v. Holbrook*, 20 Ohio St. 137; *Sloan v. Central, etc. R. Co.*, 62 Iowa, 728; 16 N. W. 331. The company itself is not liable for the negligence of the receiver or his servants (*Ballou v. Farnum*, 9 Allen, 47; *Metz v. Buffalo, etc. R. Co.*, 58 N. Y. 61), provided it had no direction or control of the property (*Williams v. Hayes*, 143 N. Y. 442; 38 N. E. 449). Compare *Farr v. Spartanburg, etc. R. Co.*, 43 S. C. 197; 20 S. E. 1009. Where two or more companies are consolidated under statute, the consolidated company is answerable for the obligations of the old companies, including torts, in the absence of any evidence or stipulations to the contrary (*Berry v. Kansas City, etc. R.*

use of its road to another company, by the negligence of whose servants, a passenger on the lessor company's train is injured, is no reason for exempting the latter from liability to its own passenger.⁵ And the lessor always remains liable for its own negligence.⁶ A company which hires a road defectively constructed, and maintains it in the same condition, is as liable for an injury as the constructing company would have been.⁷

§ 414. **Interference with highways, etc.** — The mere fact that a railroad was built close to a highway, when it might have been built equally well farther off, the injury being caused by such proximity, does not of itself constitute negligence.¹ When, however, a railroad company, in the course of

Co., 52 Kans. 759; 34 Pac. 805; Lockhart v. Little Rock, etc. R. Co., 40 Fed. 631 [two companies having traffic interchange of cars].

⁵ Railroad Company v. Barron, 5 Wall. 90, citing and approving Chicago, etc. R. Co. v. McCarthy, 20 Ill. 385; Chicago, etc. R. Co. v. Whipple, 22 Id. 105; Nelson v. Vermont, etc. R. Co., 26 Vt. 717; McElroy v. Nashua, etc. R. Co., 4 Cush. 400; Driscoll v. Norwich, etc. R. Co., 65 Conn. 220; 32 Atl. 354; Stodder v. N. Y., Lake Erie, etc. R. Co., 50 Hun, 221; 2 N. Y. Supp. 780 [defective switch]; Georgia Central R. Co. v. Phinazee, 93 Ga. 488; 21 S. E. 66; Montgomery Gas Co. v. Montgomery, etc. R., 86 Ala. 372; 5 So. 735; Chesapeake, etc. R. Co. v. Osborne [Ky.], 30 S. W. 21; Palmer v. Utah, etc. R. Co., 2 Idaho, 350; 16 Pac. 553.

⁶ See cases cited in note 1, § 120a, *ante*; also Nugent v. Boston, etc. R. Co., 80 Me. 62; 12 Atl. 797 [structural defect in station-house]; Fort Worth R. Co. v. Ferguson, 9 Tex. Civ. App. 610; 29 S. W. 61. Under a statutory provision that the owner of a railroad which leases it shall remain liable for the acts of the lessee, the lessor was held liable for permitting salt to remain on its track which at-

tracted plaintiff's stock, causing it to be killed by a passing train, whether the train belonged to lessor or lessee (Brown v. Hannibal, etc. R. Co., 27 Mo. App. 394). Under a statute making railroad companies liable for damages caused by fire communicated by "its locomotive engines," a company is not liable for fire communicated by the engine of its lessee (Hunter v. Columbia, etc. R. Co., 41 S. C. 86; 19 S. E. 197; Lipfeld v. Charlotte, etc. R. Co., 41 S. C. 285; 19 S. E. 497).

⁷ Wasmer v. Delaware, etc. R. Co., 80 N. Y. 212; see Brown v. Cayuga, etc. R. Co., 12 Id. 486; Moshier v. Utica, etc. R. Co., 8 Barb. 427. It is no defense to an action for injuries caused by a defective track used by the defendant that such track did not belong to it (Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9; 31 N. E. 412). But compare Kearney v. N. J. Cent. R. Co., 167 Pa. St. 362; 31 Atl. 637 [overflow caused by improperly constructed bridge; lessee not liable]; Ellison v. Georgia R. Co., 87 Ga. 691; 13 S. E. 809 [two railroad companies; low bridge].

¹ Beatty v. Central Iowa R. Co., 58 Iowa, 242; 12 N. W. 332; see McCandless v. Chicago, etc. R. Co., 71 Wisc. 41; 36 N. W. 620.

constructing its road, finds it necessary to interfere with a highway, it is bound to exercise its rights in the manner which will least obstruct the ordinary use of such highway;² and if it is necessary to do any act which will make travel thereon difficult or dangerous, the company must use ordinary care to warn travelers of the danger³ and to protect them from excavations, by barriers or otherwise;⁴ and it is liable to them for any injuries which could have been obviated by the use of such care. And where, through the fault of the company, such an injury occurs, for which a town is compelled in the

² In *Payne v. Troy, etc. R. Co.* (83 N. Y. 572), the space between the planking and the rail was three and one-fourth inches, while only two and one-fourth inches were required for the passage of the wheel flanges; the plank, also, was nearly three-eighths of an inch higher than the top of the rail; plaintiff's horse was injured by catching his toe-calk under the rail. Held, that though the evidence of negligence was slight, it was error to nonsuit; the court saying: "The defendant's road being across a public highway, it was its duty to construct and keep the same in such a manner as would . . . interpose no serious obstructions to the public travel." See cases cited under § 342, *ante*; also *Keitel v. St. Louis Cable, etc. R. Co.*, 28 Mo. App. 657 [duty of cable company]. A statute that every railroad company shall "place and keep that portion of its roadbed and right of way over or across which any public county road may run, in proper condition for the use of the traveling public," requires a condition reasonably suitable for the ordinary public travel (*St. Louis, etc. R. Co. v. Byas*, 12 Tex. Civ. App. 657; 35 S. W. 22).

³ Where, although not a public highway, there is a crossing constantly and notoriously used as such

by the public, without objection on the part of the company, it is bound to give some reasonable warning of the approach of trains, although not absolutely bound to ring or whistle (*Byrne v. N. Y. Central, etc. R. Co.*, 104 N. Y. 362; 10 N. E. 539. s. p., *Potter v. Bunnell*, 20 Ohio St. 150; *Veazie v. Penobscot R. Co.*, 49 Me. 119).

⁴ *Hogan v. Kentucky Union R. Co.* [Ky.], 21 S. W. 242; *Cincinnati, etc. R. Co. v. Claire*, 6 Ind. App. 390; 33 N. E. 918; *Grand Trunk R. Co. v. Siebald*, 20 Can. S. C. R. 259; *Lowell v. Boston, etc. R. Co.*, 23 Pick. 24. See also *Baltimore, etc. R. Co. v. Boteler*, 38 Md. 568. In Georgia, the law seems otherwise as to permanent cuts or embankments (*Collier v. Georgia R. Co.*, 76 Ga. 611). When a turnpike road is constructed upon the same ground, after a railroad has been built, having priority by its charter, it is the duty of the turnpike company to provide the necessary safeguards at crossings (*Zuccarello v. Nashville, etc. R. Co.*, 3 Bax. [Tenn.] 364). No guard-rail required against a foot-path, used by the public, but not a public highway (*Hooper v. Johnstown, etc. R. Co.*, 59 Hun, 121; 13 N. Y. Supp. 151). See cases cited in note 6, § 342, *ante*.

first instance to pay damages, the town may recover from the company the damages so paid by it.⁵

§ 415. **Restoration of roads and bridges.** — Railroad companies are generally required by statute to restore roads, streams and bridges, with which they have interfered, to such condition as will not impair the usefulness of such roads, streams or bridges.¹ We think they are bound to do this by force of the common law, when there is no statutory regulation on the subject;² for it can scarcely be supposed that the legislature intends in any case to allow a railroad company needlessly and permanently to destroy a public way. The company must restore the *whole* of a road, however wide, and it is not enough for it to put in order the part usually traveled.³ Where a railroad company neglects its duty in this

⁵ *Lowell v. Boston, etc. R. Co.*, 23 Pick 24; *Brooklyn v. Brooklyn R. Co.*, 47 N. Y. 475; *Duxbury v. Vermont Central R. Co.*, 26 Vt. 751; *Veazie v. Penobscot R. Co.*, 49 Me. 119. See other cases cited under § 384, *ante*.

¹ Such is the case in Great Britain, and most, if not all, of the States. When a railroad company, in constructing its road, cuts through a highway, it is bound to construct and maintain the crossing in a reasonably safe condition (*Tobias v. Michigan Cent. R. Co.*, 103 Mich. 330; 61 N. W. 514; *Lake Shore, etc. R. Co. v. McIntosh*, 140 Ind. 261; 38 N. E. 476; *Gage v. Pontiac, etc. R. Co.*, 105 Mich. 335; 63 N. W. 318 [purchaser of road liable under statute]; *Commonwealth v. Pennsylvania R. Co.*, 117 Pa. St. 637; 12 Atl. 38 [lessee of road liable]: *Coleman v. Kansas City, etc. R. Co.*, 36 Mo. App. 476 [bridge over water-course]). A railroad company, being empowered by its charter to change highways intersected by its road, and to carry such highways either under or over its track, as may be most expedient, cannot be controlled in its option by a court of

equity, if it acts with proper care and skill (*Illinois Cent. R. Co. v. Bentley*, 64 Ill. 438). See *Gear v. Cleveland, etc. R. Co.*, 43 Iowa, 83. Where the company left its rails projecting four and a half inches above the surface of the street, without any filling between them, it did not restore the street to its "former state," and was held liable (*Wasmer v. Delaware, etc. R. Co.*, 80 N. Y. 212). It is not relieved of its duty to restore a highway to its former state by the fact that a street railway company, whose track runs along the highway, is bound to keep the space between its rails in repair (*Masterson v. N. Y. Central R. Co.*, 84 N. Y. 247).

² See *Louisville, etc. R. Co. v. Hodge*, 6 Bush, 141. See *Chesapeake, etc. R. Co. v. Dyer county* [Tenn.], 11 S. W. 943.

³ *Judson v. New Haven, etc. R. Co.*, 29 Conn. 434. There the road was twelve rods wide, with two paths, one on each side, and an open common between. The railroad crossed it, and the company put so much of the road as was usually traveled into good order again, but put a culvert in the center, and left it un-

respect, and the town is compelled to pay damages to a person injured by a defect in the road caused by the neglect of the company, the town may recover from the company the amount thus paid.⁴ It has been held in Vermont that the company discharges all its obligations in this respect by using proper care at the time to restore the highway, and that it is not bound to keep watch upon it afterward, nor to repair future deteriorations.⁵ But the contrary has been adjudged in New York, as to alterations made in the course of a stream⁶ and to changes made in a highway.⁷

§ 416. Road-bridges over railroads.—Railroad companies

covered. This being filled up with snow in the winter, plaintiff fell into it and was injured. Held, the company was liable. But there is no law requiring a company to maintain a bridge of any particular width, at a highway crossing; it must be a safe structure (*Rembert v. South Carolina R. Co.*, 31 S. C. 309; 9 S. E. 968).

⁴ *Hamden v. New Haven, etc. R. Co.*, 27 Conn. 158. The court said, in that case: "The town is prevented from interfering with the building of the railroad by the authority of the legislature until the company has completed its works; yet while in this condition it is held liable for a neglect which it has no power to prevent. It is equitable, therefore, that the party whose absolute duty it is to restore the road to its former state of usefulness, should indemnify it from the consequences of such liability. And it appears to us that it would be unjust to apply to the town the principle that there shall be no contribution between joint wrongdoers." See cases cited under the last section, which go further than this; and §§ 301, 384, *ante*.

⁵ Where a railroad company, in the course of the construction of its road, lawfully turned a stream of water,

restoring it to its former state as nearly as practicable, and the new channel was properly guarded, so far as could be perceived at the time of turning it,—held, that the company was not obliged thereafter to watch the operation of the water, and take precautions to prevent its encroaching upon adjoining lands (*Norris v. Vermont Central R. Co.*, 28 Vt. 99). If the company restores the condition of the street or sidewalk to the acceptance of the municipality, and ceases to have any control over it, its liability for its safe condition then also ceases, even though such street or sidewalk may continue to be an approach to the railroad (*Quimby v. Boston, etc. R. Co.*, 69 Me. 340).

⁶ *Cott v. Lewiston R. Co.*, 36 N. Y. 214.

⁷ *People v. Troy, etc. R. Co.*, 37 How. Pr. 427. *s. p.*, *State v. Minneapolis, etc. R. Co.*, 39 Minn. 219; 39 N. W. 153 [statute]. Where a farm-crossing was necessary to reach a field, and had been maintained by the railroad company for fifty years, the company held liable for injury resulting from its proper use, when it had been torn up by a railroad accident, and not repaired (*Prince v. N. Y. Central, etc. R. Co.*, 60 Hun. 581 *mem.*; 14 N. Y. Supp. 817).

in Great Britain and Ireland are required by statute¹ to carry highways over or under their roads by bridges in certain cases, and to keep the approaches to those bridges in order, as well as the bridges themselves, and the entire material of the road over the bridges.² But where the railroad passes *over* the highway by a bridge, and for this purpose the grade of the highway is lowered at that spot, the company is not bound to keep any part of the highway in repair, after having once put it into good condition.³ Similar statutes exist in some of the United States.⁴ Under a Connecticut statute, which provides that railroad companies shall make and maintain such bridges, etc., as the convenience and safety of the public, traveling upon a highway or street, may require, it is held that a railroad company is not bound to maintain a highway under one of its bridges, in a municipality, so as to prevent the bridge from interfering with public travel.⁵ Where a railroad company, in

¹ Stat. 8 and 9 Vict. ch. 20, § 46. For a peculiar case, in which this provision of the statute was held to be incorporated in a special charter, see *Bristol, etc. R. Co. v. Tucker*, 13 C. B. N. S. 207.

² The obligation is not merely to keep the bridges in such order that the municipal authorities can maintain the roads over them, but to provide for the entire road (*North Staffordshire R. Co. v. Dale*, 8 El. & Bl. 836). The sides of a bridge crossing a railroad must be so secured by rails or other barriers as to be safe for children having occasion to cross it (*Lay v. Midland R. Co.*), 34 L. T. 30). *s. p.*, *Gates v. Pennsylvania R. Co.*, 150 Pa. St. 50; 24 Atl. 638. It is immaterial that the township was likewise liable for the non-repair of the bridge (*Id.*). In *Stewart v. Cincinnati, etc. R. Co.* (89 Mich. 315; 50 N. W. 852), it was held that whether a railroad company was or was not released from its obligation to maintain and keep in repair a bridge over a ditch at a farm-crossing, under a contract with the farm-

owner, by a sale and conveyance of the farm, if thereafter it continued the crossing, and allowed it to remain in such a condition as to invite its use as a crossing, it was bound to use ordinary care to keep it in a safe condition.

³ *London & Northwestern R. Co. v. Skerton*, 5 Best & S. 559; *Fosberry v. Waterford, etc. R. Co.*, 13 Irish C. L. 494; *Waterford, etc. R. Co. v. Kearney*, 12 Id. 224.

⁴ See *Ellsworth v. Central R. Co.*, 34 N. J. Law, 93, for the construction of such a statute. Neglect by a railroad to keep in repair a highway bridge across its track, as required by statute, is indictable as a nuisance (*New York, etc. R. Co. v. State*, 50 N. J. L. 303; 13 Atl. 1).

⁵ *Gray v. Danbury*, 54 Conn. 574; 10 Atl. 198. In that case, held that, in the absence of a statute, a railroad company was not negligent in failing to maintain the height of one of its bridges above a highway as it was when the bridge was built, where the vertical space between the road-bed and the bridge

pursuance of statutory requirements, changes the grade of a street intersected by its right of way, it stands in the place of the local authorities, and enjoys their immunity from liability to abutting owners for consequential damage.⁶ The duties of railroad companies to their own employees, with respect to overhead bridges, are discussed in §§ 198–200.

§ 417. Highway crossing at level.— In Great Britain, when a railway crosses a public carriage-road on the level, the company is required to erect and maintain gates across the road, to erect a lodge, and to keep proper persons to open and shut the gates and watch the crossing; at a crossing over a bridle-way it must erect gates, and over a footway, gates or stiles.¹ An omission so to erect and maintain gates or stiles is evidence of negligence to be left to the jury, but is not conclusive of the company's liability for a particular accident.² The subject of construction and maintenance of highway crossings, and giving signals thereat, is regulated by statute in some of the states.³ The company is not bound, as matter of law,

had been diminished by raising the street. It was also held that it cannot be said, as a conclusion of law, that a railroad company is negligent in the construction of a bridge over a highway at a height of only 10½ feet from the road-bed, where the company, the railroad commissioners, and the borough where the bridge was being built, considered the height sufficient; and where an injury complained of resulted from raising the street after the construction of the bridge.

⁶ *Rauenstein v. N. Y., Lackawanna, etc. R. Co.*, 136 N. Y. 528; 32 N. E. 1047.

¹ 8 and 9 Vict. ch. 20, §§ 47, 61; 26 and 27 Vict. ch. 92, § 6.

² *Williams v. Gt. Western R. Co.*, L. R. 9 Ex. 157; *Daniel v. Metrop. R. Co.*, L. R. 3 C. P. 216; rev'd, 3 C. P. 591. See the next chapter.

³ In Iowa, railroad companies are required by statute to construct safe crossings and cattle-guards and

erect conspicuous warning signs, at all points where the "railway crosses any public highway," and if any company shall neglect to comply, it "shall be liable for all damages sustained by reason of such neglect or refusal, and in order for the injured party to recover, it shall only be necessary for him to prove such neglect or refusal" (Code, 1873; McClain's Annot. Stat., 1888, § 1971). The present statute (Code, § 1288) does not preclude the defense of contributory negligence (*Ford v. Chicago, etc. R. Co.*, 91 Iowa, 179; 59 N. W. 5; *Hanson v. Chicago, etc. R. Co.*, 94 Iowa, 409; 62 N. W. 788). Otherwise, under former statute (*Payne v. Chicago, etc. R. Co.*, 44 Iowa, 236; *Lang v. Holiday Creek R. Co.*, 49 Iowa, 469; *Bartlett v. Dubuque, etc. R. Co.*, 20 Id. 188; *Henderson v. Chicago, etc. R. Co.*, 48 Id. 216). The embankment which constitutes the necessary approach to a railroad crossing is a part of it,

to erect signs and station flagmen to give signals⁴ at crossings but the jury may find, in view of the danger and difficulty of

and must be both made and kept in repair by the company (*Farley v. Chicago, etc. R. Co.*, 42 Iowa, 234; *Maltby v. Chicago, etc. R. Co.*, 52 Mich. 108). In Ohio, railroad companies are required to build and keep in repair good and sufficient crossings over or approaches to its tracks, side tracks, and switches, at all points where any public highway may intersect such lines, and the same "clear of snow so that the same shall at all times be in a safe and convenient condition for travel for a distance of fifty feet each way from the center of said railroad." (*Laws 1890-91*, p. 261). The statute of Illinois (*Rev. St. ch. 114, § 68*; *Myers R. S.*, 1895, ch. 114, § 54), requiring railway signals at highways, does not apply only to roads defined to be public highways by *Id.*, ch. 121, § 1, relating to roads and bridges (*Chicago, etc. R. Co. v. Dillon*, 123 Ill. 570; 15 N. E. 181). In Michigan, the statute requires a sign-board with the words "Railroad Crossing" on it to be erected, at grade crossings of highways (*How. Annot. Stat., Supple. 1890, § 3375*). See *Haas v. Grand Rapids R. Co.*, 47 Mich. 401. In Wisconsin, railroad companies are required to construct and maintain gates at street crossings in cities and incorporated villages, and trains are limited to a maximum speed of 15 miles an hour through such places (*Laws 1891, ch. 467, p. 676*). See *Barron v. Chicago, etc. R. Co.* 89 Wisc. 79; 61 N. W.

303. In Missouri, the statute (*R. S.*, 1889, § 2609) imposes the duty of constructing and maintaining crossings. It is not sufficient that the crossing is so constructed that it is possible to safely pass over it, but it should be so constructed and maintained in such condition as to be reasonably safe and convenient for public travel by persons exercising ordinary care (*Brown v. Hannibal, etc. R. Co.*, 99 Mo. 310; 12 S. W. 655). In Mississippi, every railroad company is required (*Code, 1892, § 3552*) to cause a board to be erected and kept up, on a post sufficiently high, at every highway crossing, with the inscription "Look out for the Locomotive." See *Board of Education v. Mobile, etc. R. Co.*, 72 Miss. 236; 16 So. 489. In Nebraska, the maintenance of highway crossings is required by *Comp. Stat. 1893, ch. 78, § 110*. See *Burlington, etc. R. Co. v. Koonce*, 34 Neb. 479; 51 N. W. 1033; *Omaha, etc. R. Co. v. Ryburn*, 40 Neb. 87; 58 N. W. 541; *Omaha, etc. R. Co. v. Brady*, 39 Neb. 27; 57 N. W. 767; *Chicago, etc. R. Co. v. Metcalf*, 44 Neb. 848; 63 N. W. 51. In Texas, the statute (*R. S. of 1889, art. 4232*) requires trains to give certain signals at least 80 rods from the place where the railroad shall "cross" any public road, and also to stop in approaching a place where two railroads "cross." This statute applies only to crossings at grade (*Missouri, etc. R. Co. v. Thomas*, 87 Tex. 282; 28 S. W. 343;

⁴ *Weber v. N. Y. Central R. Co.*, 58 N. Y. 451; *Grippen v. N. Y. Central R. Co.*, 40 Id. 34. It is, however, the duty of a railroad company in operating its railroad, in some manner to give notice of the approach of

its trains at grade crossings (*Dyer v. Erie R. Co.*, 71 N. Y. 228; *Bleyle v. N. Y. Central R. Co.*, 11 N. Y. St 585; and cases cited under next note).

a particular crossing, that it was negligence to omit such precautions.⁵ It is not, however, for the jury to decide what signs should be erected or signals given at a crossing.⁶ A mere compliance with statutory requirements in respect to signs, signals, and other precautions for the public protection, at railroad crossings, is not necessarily a full discharge of the

see *Taylor, etc. R. Co. v. Warner*,
Tex. Civ. App. ; 31 S. W. 66).

It is held in Kansas that if, by the growth of business, or the widening of the vehicles used upon the highway, a crossing becomes inadequate for the public accommodation, then it is the duty of the company (under

Gen. St. 1889, pars. 1207, 1262), to widen it, so as to be reasonably safe for the increased traffic and the widened vehicles drawn in the usual and proper manner (*Atchison, etc. R. Co. v. Henry*, Kans. ; 45 Pac. 576).

⁵ Where a railroad company creates, at a public crossing, by the construction or maintenance of its tracks or other erections, a situation of unusual peril to those having occasion to cross, it is bound to avert such peril by every reasonable precaution beyond the ordinary signals, and such precautions may extend to the erection of gates, and to keeping them closed while trains are passing (*Delaware, etc. R. Co. v. Shelton*, 55 N. J. Law, 342; 26 Atl. 937). Where, because of permanent obstructions, plaintiff could not have seen the approaching train, the company's failure to station one at the crossing to give warning of approaching trains was held to be negligence (*Louisville, etc. R. Co. v. Hackman*, Ky. ; 30 S. W. 407; *Hubbard v. Boston, etc. R. Co.*, 162 Mass. 132; 38 N. E. 366). s. p., in *Shaber v. St. Paul, etc. R. Co.*, 28 Minn. 103. The voluntary establishment of gates at a crossing is evidence of their necessity, and, being advertised to travelers, it is evidence of negligence if they are not properly attended and maintained (*State v. Boston, etc. R. Co.*, 80 Me. 430; 15 Atl. 36). The fact that a flagman has always been kept

at a crossing, and that he was absent at the time of an accident, is competent as bearing upon the question of the company's negligence under all the circumstances; and so is a municipal ordinance requiring a flagman to be stationed at all street crossings (*McGrath v. N. Y. Central R. Co.*, 63 N. Y. 522; *Pittsburgh, etc. R. Co. v. Yundt*, 78 Ind. 373).

⁶ *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Beisiegel v. N. Y. Central R. Co.*, 40 Id. 9. In an action for an injury caused by dummy engines running through a city street, the court instructed the jury that it was for them to say whether or not defendants should have adopted other precautions than they did. Held, that it was not the fair import of the instruction, *when taken in connection with other parts of the charge*, that the jury were at liberty to find negligence in not having a flagman or gate at the crossing, and that it was, therefore, unobjectionable (*Cumming v. Brooklyn R. Co.*, 104 N. Y. 669; 10 N. E. 855). See also *Worster v. Forty-second St. R. Co.*, 50 N. Y. 203; *Rockwell v. Third Ave. R. Co.*, 64 Barb. 438; *Mann v. Cent. Vt. R. Co.*, 55 Vt. 484; *Maltby v. Chicago, etc. R. Co.*, 52 Mich. 108.

company's obligation to provide safe crossings.⁷ This duty may arise, though the highway crossed may not have been legally established as such.⁸ Though a railroad company is not obliged to construct a crossing over a road in common use, but not a highway, if it does, it is liable for an injury resulting from its negligent construction.⁹

§ 417a. Other crossings at level.—A railroad company is bound to make and maintain safe crossings, not only where its road crosses public highways,¹ but also where it crosses its own private ways, if these are notoriously used as public ways, upon the invitation or continued sanction² of the company.

¹ Thus the Massachusetts Rev. St. ch. 39, §§ 78, 79, requires a board to be placed, and bells to be rung, at crossings, and yet it was held that a compliance with these regulations would not exempt the company from the obligation of using reasonable care in other respects; and that, if other precautions were necessary, the company was bound to take them (*Bradley v. Boston, etc. Co.*, 2 Cush. 539; *Linfield v. Old Colony R. Co.*, 10 Cush. 562). See also *Beisiegel v. N. Y. Central R. Co.*, 40 N. Y. 9; *Norton v. Eastern R. Co.*, 113 Mass. 366. Compare *McCreary v. Boston, etc. R. Co.*, 153 Mass. 300; 26 N. E. 864. The question whether the crossing was on a public traveled road, held for the jury (*Lewis v. N. Y., Lake Erie, etc. R. Co.*, 123 N. Y. 496; 26 N. E. 357). See § 333, *ante*.

⁸ *Delaware, etc. R. Co. v. Converse*, 139 U. S. 469; 11 S. Ct. 569 [thirty years' user]. Where a road is openly used as a highway by the public, and is recognized by a railway company as such, by permitting the public to cross the track, and by assuming to maintain a crossing at that point, it is immaterial that the road has not been legally established in order to hold company liable for defects in the crossing (*Lillstrom v. Northern*

Pac. R. Co., 53 Minn. 464; 55 N. W. 624; *Kelly v. So. Minnesota R. Co.*, 28 Minn. 98; 9 N. W. 588).

⁹ *Gulf, etc. R. Co. v. Montgomery*, 85 Tex. 67; 19 S. W. 1015; *Taylor, etc. R. Co. v. Warner*, 88 Tex. 642; 32 S. W. 868.

¹ See § 414, *ante*.

² Where a school-boy was injured while on a private crossing of the company, held, that if plaintiff was on the crossing at the time he was struck, it was no defense for the company that he did not enter upon the crossing at the proper place, (*Murphy v. Boston, etc. R. Co.*, 133 Mass. 121). The distinction between an inducement or invitation to the public to use a private crossing, and a mere license or permission to use it, was made in *Sweeny v. Old Colony, etc. R. Co.* (10 Allen, 368), where the court said: "The place of crossing was situated between two streets of the city, and was used by great numbers of people who had occasion to pass from one street to the other, and it was fitted and prepared by the defendants with a convenient plank-crossing, such as is usually constructed in highways when they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails.

And if such crossings are provided, all persons who cross elsewhere do so at their own risk.³ In many of the states, a company is bound by statute to fence its track where a private way crosses it;⁴ and to construct and maintain private farm crossings, in certain cases, on demand,⁵ but the duty of fencing

It had been so maintained by the defendants for a number of years. These facts . . . amount to an inducement held out by the defendants to persons having occasion to pass, to believe that it was a highway and to use it as such." In *Barry v. N. Y. Central R. Co.* (92 N. Y. 289), a boy was killed while on a private crossing which had been used by the public for thirty years; the train backed up without a bell being rung or other signal given, in charge of a brakeman who could not see persons on the track. The court said: "It is undisputed that for more than thirty years, the public were in the habit of crossing the tracks at this point. . . . Several hundred people crossed there every day. There can be no doubt that the acquiescence of the defendant for so long a time, in the crossing of the track by pedestrians, amounted to a license and permission, by the defendant, to all persons to cross the tracks at this point. So long as it permitted the public use, it was bound to such reasonable precautions as ordinary prudence dictated to protect wayfarers from injury." *s. p.*, *Nichols v. Washington, etc. R. Co.*, 83 Va. 99; 5 S. E. 171; *Stewart v. Cincinnati, etc. R. Co.*, 80 Mich. 166; 44 N. W. 1116; *Hansan v. Southern Pac. R. Co.*, 105 Cal. 379; 38 Pac. 957. The rule of the text does not apply where the company fails to keep in repair a private way, which is used by the public by the mere license of the company (*Ferguson v. Virginia, etc. R. Co.*, 13 Nev. 184; *Illinois Central R. Co. v. Beard*, 49 Ill. App. 232).

³ A railroad company obstructed the passage across a highway by its train. Decedent, wishing to drive his team across, was compelled to cross the tracks at a point where no crossing had been made or provided, and where the track was about twelve inches from the ground to the top of the rail. While so crossing, the jostling and toppling of the cart threw him out under its wheels; and he was injured so that he died. Held, that he crossed the track where he did at his peril, and that the jostling of the cart, and his being thrown from it in consequence, was not the proximate result of the obstruction of the public crossing by the defendant's train (*Jackson v. Nashville, etc. Ry. Co.*, 13 Lea, 491).

⁴ *Indianapolis, etc. R. Co. v. Thomas*, 84 Ind. 194; *Indiana Cent. R. Co. v. Leamon*, 18 Id. 173; *Railroad Co. v. Cunningham*, 39 Ohio St. 327. While a railroad is not liable for killing stock belonging to one who has been permitted to erect a gate at a private crossing for his own convenience, where the cattle entered upon the track through the gate, yet it is liable in such case for killing stock belonging to a third person (*Wabash R. Co. v. Williamson*, 104 Ind. 154; 3 N. E. 814). See § 418, *et seq. post*.

⁵ Where a farm crossing is on the company's own land, and by its nature and use is a continued invitation to those lawfully having a right to cross from one part of the farm to the other to cross there, it is the company's duty to keep it in safe condition (*Stewart v. Cincinnati, etc. R. Co.*, 80 Mich. 166; 44 N. W. 1116).

is imposed for the protection of the public, and not of the individual for whose benefit the private way exists. As to the latter, the company is not bound to constant vigilance to keep the gates closed.⁶ A company is bound to use ordinary care in crossing at level the track of another railroad.⁷

A company which has maintained a farm crossing for forty-nine years, and there is no evidence justifying its discontinuance, will not be heard to deny its duty to maintain it (*Prince v. N. Y. Central R. Co.*, 60 Hun, 581, *mem.*; 14 N. Y. Supp. 817). It is negligence to so construct a farm-crossing as to leave the space between the rail and the plank large enough to take in the foot of a horse (*Cotton v. N. Y., Lake Erie, etc. R. Co.*, 65 Hun, 625, *mem.*; 20 N. Y. Supp. 347). A verdict against a railroad company in favor of a person injured in attempting to pass over a defective crossing, built (it not appearing by whom) for the private convenience of a third person, with whom the injured person had no business at the time, will not be upheld (*Cornell v. Skaneateles R. Co.*, 61 Hun, 618, *mem.*; 15 N. Y. Supp. 581). Merely permitting dirt taken from a cut near a private crossing to be thrown up, or weeds to grow, on the right of way, so as to obstruct the view of trains by persons about to cross, is not negligence,

at least so far as concerns those who have no right to the crossing (*Atchison, etc. R. Co. v. Parsons*, 42 Ill. App. 93).

⁶ *Evansville, etc. R. Co. v. Mosier*, 101 Ind. 597; *Terre Haute, etc. R. Co. v. Smith*, 16 Ind. 102. Where gates are allowed at farm-crossings for the convenience of an adjoining land-owner, he is bound to keep them closed, and if he fails to do so and his animals pass through them and are injured, he cannot recover from the company on the ground that it has neglected to fence as required by statute (*Bond v. Evansville, etc. R. Co.*, 100 Ind. 301).

⁷ *Chicago, etc. R. Co. v. Chambers*, 15 C. C. A. 327; 68 Fed. 148. A private track crossed defendant's track on grade in two places. Held, that the fact that defendant permitted such a crossing on grade raised no presumption of negligence against defendant, who need not show that the grade crossing could not be avoided (*Bunting v. Pennsylvania R. Co.*, 118 Pa. St. 204; 12 Atl. 481).

CHAPTER XX.

RAILROAD INJURIES TO ANIMALS.

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| <p>§ 418. English rule as to keeping animals in.</p> <p>419. Where English rule does not prevail.</p> <p>420. Unequal operation of common-law rule.</p> <p>421. Statutory regulations.</p> <p>422. Application and validity of statutes</p> <p>423. When fences must be put up.</p> <p>424. Fences must be "sufficient."</p> <p>425. Fences must be maintained.</p> <p>426. Frightening animals on fenced roads.</p> <p>427. Duty to signal to cattle.</p> <p>428. Care towards trespassing cattle.</p> <p>429. Checking or stopping train.</p> <p>430. Checking speed for trespassing cattle.</p> <p>431. Statutory rules as to checking speed.</p> <p>432. Presumption as to negligence.</p> <p>433. When animal is rightfully on track.</p> <p>434. Where fences are not required.</p> <p>435. Fences and cattle-guards in towns.</p> <p>436. Injury must be owing to defect in fence.</p> <p>437. Effect of adjoining owner's agreement.</p> <p>438. Employment of adjacent owner to build fence.</p> | <p>§ 439. Adjacent owner's option to build fence.</p> <p>440. Compensated owner of land cannot recover.</p> <p>441. Company's agreement to fence.</p> <p>442. Grants of right of way.</p> <p>443. Who may enforce contract to fence.</p> <p>444. Liability where one company uses another's track.</p> <p>445. Liability of lessees of road.</p> <p>446. Liability of other parties.</p> <p>447. Application of fence-laws to personal injuries.</p> <p>448. For what injuries company is liable.</p> <p>449. Who entitled to benefit of statute.</p> <p>450. Notice of defect, when to be given.</p> <p>451. Contributory negligence on fenced roads.</p> <p>451a. Contributory negligence on unfenced roads.</p> <p>452. Owner's willful conduct.</p> <p>453. Rule in Illinois, etc.</p> <p>454. Rule in Maryland and Georgia.</p> <p>455. Degree of care in maintaining fence.</p> <p>456. Company's action against owner.</p> |
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§ 418. English rule as to keeping animals in.— For the purpose of stating the common-law obligations of railroad companies towards cattle and other domestic animals found upon the track without special permission, the states of the

American Union must be divided into two classes: (1) those which require every man to keep his cattle within his own land, and (2) those which do not. In no state does the common law require any land-owner to keep others' cattle out. By the common law of England,¹ and of the states which have adopted it, such as Maine,² New Hampshire,³ Vermont,⁴ Massachusetts,⁵ Rhode Island,⁶ New York,⁷ New Jersey,⁸ Delaware,⁹ Maryland,¹⁰ Kentucky,¹¹ Indiana,¹² Michigan,¹³ Wisconsin,¹⁴ Minnesota,¹⁵ and Kansas,¹⁶ a railroad company, like any other land-owner, is under no obligation to erect any fences to keep cattle out; and the owners of

¹ *Buxton v. Northeastern R. Co.*, L. R. 3 Q. B. 549; *Wiseman v. Booker*, L. R. 3 C. P. Div. 184; *Ricketts v. East India Docks R. Co.*, 12 C. B. 160; *Dawson v. Midland R. Co.*, L. R. 8 Ex. 8; *Fawcett v. York, etc. R. Co.*, 16 Q. B. 610; *Manchester, etc. R. Co. v. Wallis*, 14 C. B. 213.

² *Perkins v. Eastern, etc. R. Co.*, 29 Me., 307; see *Wilder v. Maine, etc. R. Co.*, 65 Id. 333; *Webber v. Closson*, 35 Id. 26.

³ *Towns v. Cheshire R. Co.*, 21 N. H., 363; *Cornwall v. Sullivan R. Co.*, 21 Id. 161; *Cressey v. Northern, etc. R. Co.*, 59 Id. 564.

⁴ *Trow v. Vermont, etc. R. Co.*, 24 Vt. 487; *Hurd v. Rutland, etc. R. Co.*, 25 Id. 116; *Congdon v. Central, etc. R. Co.*, 56 Id. 390.

⁵ *Stearns v. Old Colony, etc. R. Co.*, 1 Allen, 493; *Towne v. Nashua, etc. R. Co.*, 124 Mass. 101; *Maynard v. Boston, etc. R. Co.*, 115 Id. 458.

⁶ *Tower v. Providence, etc. R. Co.*, 2 R. I. 404.

⁷ *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; aff'g 5 Denio, 255. See *Spinner v. N. Y. Central, etc. R. Co.*, 67 N. Y. 153; *Terry v. N. Y. Central, R. Co.*, 22 Barb. 579.

⁸ *Vandegrift v. Rediker*, 22 N. J. L. 185; *Price v. N. J. R., etc. Co.*, 31 Id. 229.

⁹ *Vandegrift v. Delaware, etc. R. Co.*, 2 Houst. 297.

¹⁰ *Baltimore, etc. R. Co. v. Lam-born*, 12 Md. 257; *Keech v. Baltimore, etc. Co.*, 17 Id. 33; *Annapolis, etc. R. Co. v. Baldwin*, 60 Id. 88. The owner of cattle which stray upon the track, and thus damage a train, is liable to the company if he has been negligent in his care of the cattle, but not otherwise (Id.).

¹¹ *Louisville, etc. R. Co. v. Ballard*, 2 Metc. 177; *Louisville, etc. R. Co. v. Milton*, 14 B. Monr. 75.

¹² *Indianapolis, etc. R. Co. v. Caldwell*, 9 Ind. 397; *La Fayette, etc. R. Co. v. Shriner*, 6 Id. 141; *Pittsburgh, etc. R. Co. v. Stuart*, 71 Id. 500.

¹³ *Williams v. Mich. Central R. Co.*, 2 Mich. 260. See *Grand Rapids, etc. R. Co. v. Monroe*, 47 Id. 152.

¹⁴ *Stucke v. Milwaukee, etc. R. Co.*, 9 Wisc. 203; *Galpin v. Chicago, etc. R. Co.*, 19 Id. 604; *Bennett v. Chicago, etc. R. Co.*, 19 Id. 145. See *Veerhusen v. Chicago, etc. R. Co.*, 53 Id. 689.

¹⁵ *Locke v. St. Paul, etc. R. Co.*, 15 Minn. 350; *Fitzgerald v. Same*, 29 Id. 336; *Witherell v. Same*, 24 Id. 410.

¹⁶ *Union Pacific R. Co. v. Rollins*, 5 Kans. 167; *Baker v. Robbins*, 9 Id. 303; *Markin v. Priddy*, 40 Id. 684; 20 Pac. 474.

cattle ought to keep them in. In Pennsylvania, the old rule of common law was always so far modified that the owners of cattle were not absolutely bound to keep them in, and were therefore liable for merely nominal damages for their cattle straying into the unenclosed land of others.¹⁷ But this is a matter of practically no importance in railroad law; and the courts of Pennsylvania have gone quite as far as those of New York in denying relief to the owners of cattle straying upon railroads and suffering injury thereby.¹⁸ In all these states, therefore, cattle entering upon the premises of a railroad are presumptively trespassers, and enter at their own peril, like any other trespasser.¹⁹ Even if they have escaped without the slightest fault of their owner, that makes no difference.²⁰ Except by virtue of some statute, the owner of an animal which is injured upon the premises of a railroad company cannot maintain any action against the company, without showing, either that the animal was lawfully upon the track,²¹ or that the company was guilty of such negligence as would make it liable to an avowed trespasser.²² If an adjoining land-owner kept his cattle within a fence, which was broken down by the negligence of the railroad company's servants, the company would, of course, be liable for injuries suffered by the cattle from its trains, after they had passed upon the track through the breach thus made,²³ but not if such breach were made by a stranger. The owner of dogs, cats, birds, or similar small wandering creatures, is not strictly bound to keep them at home, and is liable only for positive negligence in managing them.²⁴ The owner of a dog, therefore, may recover for injuries to it, caused by the neglect of a railroad engineer to use ordinary care to avoid such injuries.²⁵ But hogs are subject to the same rules as cattle.²⁶

¹⁷ *Knight v. Abert*, 6 Pa. St. 472. But it seems that they are liable for any substantial damage done (see cases in next note).

¹⁸ *N. Y. & Erie R. Co. v. Skinner*, 19 Pa. St. 298; *Reeves v. Delaware, etc. R. Co.*, 30 Id. 455; *Gillis v. Penn. R. Co.*, 59 Id. 142; *Penn. R. Co. v. Riblet*, 66 Id. 164.

¹⁹ *Munger v. Tonawanda R. Co.*, 4 N. Y. 349.

²⁰ *Ib.*; *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101.

²¹ See all the cases before cited.

²² See §§ 428-430, *post*.

²³ *Wright v. Indianapolis, etc. R. Co.*, 18 Ind. 168.

²⁴ So held, as to dogs (*Read v. Edwards*, 17 C. B. [N. S.] 245; *Jenkins v. Turner*, 1 Ld. Raym. 109).

²⁵ *St. Louis, etc. R. Co. v. Hauks*, 78 Tex. 300; 14 S. W. 691.

²⁶ *Wells v. Beal*, 9 Kans. 406.

§ 419. **Where English rule does not prevail.**—In most of the southern and western states, the English common-law rule upon this point has never been in force, having been considered inapplicable to the condition of a newly settled country. Therefore in Connecticut, Ohio, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Texas, Arkansas, Missouri, Illinois, Iowa, both the Dakotas, Nebraska, Colorado, Wyoming, Montana, Idaho, Utah, Nevada, California, Oregon and all territory not organized into states, including the Indian Territory, the owners of cattle, except as otherwise prescribed by statute, are not bound to keep them in, and railroad companies are not bound to keep them out.¹ In those states and territories, cattle

¹ *Connecticut*: Studwell v. Rich, 14 Conn. 292.

Ohio: Kerwhacker v. Cleveland, etc. R. Co., 3 Ohio St. 172; Cleveland, etc. R. Co. v. Elliott, 4 Id. 474.

Virginia: Trout v. Virginia, etc. R. Co., 23 Gratt. 619.

West Virginia: Washington v. Baltimore, etc. R. Co., 17 W. Va. 190. s. p., Blaine v. Chesapeake, etc. R. Co., 9 Id. 252. The company is not bound to fence (Layne v. Ohio River R. Co., 35 W. Va. 438; 14 S. E. 123).

North Carolina: Laws v. North Carolina, etc. R. Co., 7 Jones, Law, 468.

South Carolina: Danner v. South Carolina, etc. R. Co., 4 Rich. Law, 329; Murray v. Same, 10 Id. 227; Jones v. Columbia, etc. R. Co., 20 S. C. 249.

Georgia: Macon, etc. R. Co. v. Sester, 30 Ga. 911; Georgia, etc. R. Co. v. Neely, 56 Id. 540.

Alabama: Mobile, etc. R. Co. v. Williams, 53 Ala. 595; Alabama, etc. R. Co. v. McAlpine, 71 Id. 545.

Mississippi: Vicksburgh, etc. R. Co. v. Patton, 31 Miss. 156; New Orleans, etc. R. Co. v. Field, 46 Id. 573; Raiford v. Mississippi, etc. R. Co., 43 Id. 233. The owner of cattle

has the right, in the absence of any contrary local legislation, to pasture them upon the commons, even in an incorporated town, and his doing so is not negligence which will relieve a railroad company (Chicago, etc. R. Co. v. Jones, 59 Miss. 465).

Louisiana: Stevenson v. New Orleans, etc. R. Co., 35 La. Ann. 498.

Texas: Texas, etc. R. Co. v. Young, 60 Tex. 201.

Arkansas: Little Rock, etc. R. Co. v. Finley, 37 Ark. 562; Kansas, etc. R. Co. v. Kirksey, 48 Id. 366; 3 S. W. 190.

Missouri: Hannibal, etc. R. Co. v. Kenney, 41 Mo. 271; Gorman v. Pacific, etc. R. Co., 26 Id. 442; Silver v. Kansas City, etc. R. Co., 78 Id. 528.

Illinois: Seeley v. Peters, 10 Ill. 130; Bass v. Chicago, etc. R. Co., 28 Id. 9; Headen v. Rust, 39 Id. 186; Chicago, etc. R. Co. v. Kellam, 92 Id. 245. It being lawful for cattle to run at large upon the commons, their owner is not chargeable with negligence merely because they stray from the commons upon the railroad (Rockford, etc. R. Co. v. Rafferty, 73 Ill. 58; Chicago, etc. R. Co. v. Cauffman, 38 Id. 424).

straying upon an unfenced railroad are not trespassers; and although the company has a perfect right to drive them gently off,² it is bound to use ordinary care for the purpose of avoiding injury to them;³ and their owner is not chargeable with contributing at all to their injury by allowing them to stray,⁴ so long as he does not knowingly suffer them to be upon the railroad premises.⁵ A railroad company is not bound, in such cases, to reduce the speed of its trains to such a limit as will certainly enable them to be stopped in time to save

Iowa: *Alger v. Mississippi, etc. R. Co.*, 10 Iowa, 268; *Whitbeck v. Dubuque, etc. R. Co.*, 21 Id. 103; *Van Horn v. Burlington, etc. R. Co.*, 59 Id. 33; *Inman v. Chicago, etc. R. Co.*, 60 Id. 459; *Pearson v. Milwaukee, etc. R. Co.*, 45 Id. 497.

Dakota: *Sprague v. Fremont R. Co.*, 6 Dak. 86; 50 N. W. 617.

Nebraska: *Burlington, etc. R. Co. v. Franzen*, 15 Neb. 365; 18 N. W. 511.

Colorado: *Morris v. Fraker*, 5 Colo. 425. See *Denver, etc. R. Co. v. Henderson*, 10 Colo. 1; 13 Pac. 910. Neither common nor statute law in Colorado requires a railroad to fence its track to prevent cattle from straying on it (*Cowan v. Union Pac. R. Co.*, 35 Fed. 43).

Nevada: *Chase v. Chase*, 15 Nev. 259.

California: *Richmond v. Sacramento, etc. R. Co.*, 18 Cal. 351; *Logan v. Gedney*, 38 Id. 579.

Oregon: *Moses v. Southern Pac. R. Co.*, 18 Oreg. 385; 23 Pac. 498. *Campbell v. Bridwell*, 5 Oreg. 311. As Washington was originally part of Oregon, the same law must prevail there.

Indian Territory: *Chicago, etc. R. Co. v. Woodworth*, 35 S. W. 238. In the Indian Territory, where neither the owners of animals nor railroad companies are required to fence, it is the duty of engineers to use reasonable care to discover stock

upon the track, and to avoid injuring them when discovered (*Gulf, etc. R. Co. v. Washington*, 49 Fed. 347; 4 U. S. App. 121; 1 C. C. A. 286; *Same v. Childs*, 49 Fed. 358; 4 U. S. App. 200; 1 C. C. A. 297). Owners of stock in the Indian Territory have a right to let them run at large, and it is not contributory negligence to turn horses loose to graze in the vicinity of a railroad track, upon which they stray and are killed (*Eddy v. Evans*, 58 Fed. 151; 7 C. C. A. 129). The English rule was never law in territories of the United States (*Buford v. Houtz*, 133 U. S. 320; 10 S. Ct. 305). This decision practically settles the law also for Wyoming, Montana, Idaho and Utah, except as modified by statute.

² *Kerwhacker v. Cleveland, etc. R. Co.*, 3 Ohio St. 172.

³ *Prickett v. Atchison, etc. R. Co.*, 33 Kans. 748; 7 Pac. 611.

⁴ *Kerwhacker v. Cleveland, etc. R. Co.*, 3 Ohio St. 172; *Balcom v. Dubuque, etc. R. Co.*, 21 Iowa 102; *Smith v. Chicago, etc. R. Co.*, 34 Id. 506; *Ewing v. Chicago, etc. R. Co.*, 72 Ill. 25; *Flint, etc. R. Co. v. Lull*, 28 Mich. 510; *Belle fontaine R. Co. v. Reed*, 33 Ind. 476; *Prickett v. Atchinson, etc. R. Co.*, 33 Kans. 748; 7 Pac. 611; *St. Joseph, etc. R. Co. v. Grover*, 11 Kans. 302.

⁵ See *Kerwhacker v. Cleveland, etc. R. Co.*, 3 Ohio St. 172.

straying cattle,⁶ so long as none are in sight; but it is bound to keep a vigilant watch for such cattle, at places where experience shows that they are frequently met with,⁷ to have all usual and proper facilities for sounding alarms and stopping trains soon after cattle may be seen,⁸ and when they are seen to be in danger, to sound such alarms and slacken speed,—stopping, if necessary, to save the animals.⁹ But the mere want of a fence is no evidence of negligence;¹⁰ and the mere fact that a train injures cattle is not sufficient to entitle their owner to recover damages;¹¹ he must prove affirmatively some act of negligence,¹² since the company is not liable for unavoidable accidents happening to cattle upon its land;¹³ nor is it

⁶ Central Ohio R. Co. v. Lawrence, 13 Ohio St. 66.

⁷ Since domestic animals have free range in Missouri, they are not trespassers on an unfenced track, and the trainmen are bound to keep a reasonable lookout for them, as well as to use care to avoid running over them when seen (Hill v. Missouri Pac. R. Co., 121 Mo. 477; 26 S. W. 576; aff'd 49 Mo. App. 520). To same effect, Searles v. Milwaukee, etc. R. Co., 35 Iowa, 490; Alger v. Mississippi, etc. R. Co., 10 Id. 268; Gorman v. Pacific R. Co., 26 Mo. 441; McPheeters v. Hannibal, etc. R. Co., 45 Id. 22; Tarwater v. Hannibal, etc. R. Co., 42 Id. 193; Mobile, etc. R. Co. v. Hudson, 50 Miss. 572; Vicksburg, etc. R. Co. v. Patton, 31 Id. 156; Washington v. Baltimore, etc. R. Co., 17 W. Va. 190. So by statute, in Alabama and Tennessee. Limited in Arkansas (Memphis, etc. R. Co. v. Kerr, 52 Ark. 162; 12 S. W. 329).

⁸ Stevenson v. New Orleans, etc. R. Co., 35 La. Ann. 498; aff'd in Day v. New Orleans R. Co., 35 Id. 694.

⁹ See §§ 427, 428, 429, *post*. The duty to use ordinary care to avoid injury *after* the animal is seen is universally conceded (see Arkansas case, *supra*).

¹⁰ Cleveland, etc. R. Co. v. Elliott, 4 Ohio St. 474; Terre Haute, etc. R. Co. v. Augustus, 21 Ill. 186; Kansas, etc. R. Co. v. Kirksey, 48 Ark. 366; 3 S. W. 190.

¹¹ Atchison, etc. R. Co. v. Betts, 10 Colo. 431; 15 Pac. 821.

¹² Alton, etc. R. Co. v. Baugh, 14 Ill. 211; Chicago, etc. R. Co. v. Patchin, 16 Id. 198; Henry v. Dubuque, etc. R. Co., 2 Iowa, 288; Chicago, etc. R. Co. v. Utley, 38 Ill. 410; Memphis, etc. R. Co. v. Blakey, 43 Miss. 218; see Atlantic, etc. R. Co. v. Griffin, 61 Ga. 11; East Tenn. etc. R. Co. v. Bayliss, 74 Ala. 150; Mobile, etc. R. Co. v. Williams, 53 Id. 595; Maynard v. Norfolk, etc. R. Co., 40 W. Va. 331; 21 S. E. 733; Richmond, etc. R. Co. v. Noell, 86 Va. 19; 9 S. E. 473 [requirement of diligence to recapture animals escaping on track]; Savannah, etc. R. Co. v. Rice, 23 Fla. 575; 3 So. 170.

¹³ Cleveland, etc. R. Co. v. Elliott, 4 Ohio St. 474; Kerwhacker v. Cleveland, etc. R. Co., 3 Id. 172; Great Western R. Co. v. Morthland, 30 Ill. 451; Montgomery v. Wilmington, etc. R. Co., 6 Jones Law, 464; Garriss v. Portsmouth, etc. R. Co., 2 Iredell, Law, 324; East Tennessee, etc. R. Co. v. Watters, 77 Ga. 69.

required to abstain from using its property for any lawful purpose,¹⁴ or to use any care to keep the premises in good condition,¹⁵ on account of the possibility that cattle may stray upon the unfenced track and so suffer injury. A railroad company can relieve itself from the duty of watching for straying cattle, by adequately fencing its road;¹⁶ and it will not be liable to a revival of this duty by a breach in the fence of which it had not notice in time to repair it before the injury complained of.¹⁷ A railroad company may protect itself against such liabilities by procuring a contract from adjoining owners for the maintenance by the latter of the necessary fences, which will be a good defense to any claims of the parties so contracting, their grantees and tenants.¹⁸

§ 420. Unequal operation of common-law rule.—It was soon felt that the rigid application of the English common law rule to a novel state of facts was calculated to work practical injustice and involved a great amount of cruelty to valuable animals. The rule of the common law was established at a period when cattle suffered but little injury from wandering, when no vehicle traveled at a rate exceeding ten miles an hour, and few attained to more than half of that speed. A straying horse always, and a straying ox generally, could avoid collision with such travelers. But the introduction of steam as a motive power changed all this, and exposed straying cattle to

¹⁴ *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66.

¹⁵ *Pittsburgh, etc. R. Co. v. Birmingham*, 29 Ohio St. 364; *Kansas, etc. R. Co. v. Kirksey*, 48 Ark. 366; 3 S. W. 190; *Ill. Central R. Co. v. Carraher*, 47 Ill. 333; *Hughes v. Hannibal, etc. R. Co.*, 66 Mo. 325.

¹⁶ See *Alger v. Mississippi, etc. R. Co.*, 10 Iowa, 268.

¹⁷ *Aylesworth v. Chicago, etc. R. Co.*, 30 Iowa, 459.

¹⁸ *Cincinnati, etc. R. Co. v. Watson*, 4 Ohio St. 424; *Wilder v. Maine Central R. Co.*, 65 Me. 332; *Vandergrift v. Delaware, etc. R. Co.*, 2 Houst. 287; *St. Louis, etc. R. Co. v. Todd*, 36 Ill. 409; see *Corry v.*

Great Western R. Co., L. R. 6 Q. B. Div. 237; 7 Id. 322; *Bronson v. Coffin*, 108 Mass. 175; *Gill v. Atlantic, etc. R. Co.*, 27 Ohio St. 240; *Huston v. Cincinnati, etc. R. Co.*, 21 Id. 235; *Indianapolis, etc. R. Co. v. Shimer*, 17 Ind. 295; *Duffy v. N. Y. & Harlem R. Co.*, 2 Hilt. 496. See § 437, *post*. Where the owner of land conveys the right of way by agreement, he waives, in advance, all damages for additional fence building required, it being presumed that these are included in the purchase price (*St. Louis, etc. R. Co. v. Walbrink*, 47 Ark. 330; 1 S. W. 545).

a new danger, which could only be avoided by an activity unnatural to most of them, or by keeping them entirely off the road. Against such dangers new precautions were required; and, eastern judges not venturing to modify the common law so as to adopt it to modern conditions, the subject has been generally regulated by statutes requiring railroad companies to fence their tracks.

§ 421. Statutory regulations.—The British Parliament appears to have been the first to recognize the requirements of the new situation; and in 1846 it made universal a regulation, previously applied by separate statutes, requiring all railways to enclose their tracks.¹ New York seems to have followed first, in the adoption of a similar general law, in 1848, re-enacted in 1850, and extended to all railroads in 1854. By these statutes, as amended from time to time, railroad companies are required to erect and maintain and keep in repair fences on both sides of their roads and cattle-guards at every road-crossing, sufficient to keep out cattle, horses, sheep and hogs. In case of their failure to do so, such companies and all others in possession of their roads are liable for all damages done by their agents, engines or cars to any domestic animals on such roads.² Statutes of the same general nature have been enacted

¹ Stat. 8 and 9 Vict. ch. 20 (called the Railway Clauses Consolidation Act), § 68.

² As the old statutes of 1850 and 1854 have been the basis of all New York decisions, down to 1891, and of nearly all, down to 1897, and have been copied in many other states, we give the substance of those laws, as well as of the new one. The following is the substance of § 8 of Laws, 1854, ch. 282: "Every railroad corporation, whose line of road is open for use, . . . shall erect and maintain fences on the sides of their roads of the height and strength of a division fence, as required by law, with openings or gates or bars therein at farm crossings of such railroads, . . . and shall also construct and maintain cattle-guards at all

road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on such railroad. And so long as such fences and cattle-guards shall not be made, and when not in good repair, such railroad corporation, and its agents, shall be liable for damages which shall be done by the agents or engines of such corporation to any cattle, horses, sheep or hogs thereon; and when such fences and guards shall have been duly made, and shall be kept in good repair, such corporation shall not be liable for any such damages, unless negligently or willfully done. . . . No railroad corporation shall be required to fence the sides of its roads, except when such fence is necessary to prevent horses, cattle, sheep and hogs

in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, New Jersey, Virginia, Ohio, Kentucky, Tennessee, Indiana, Illinois, Michigan, Wisconsin, Iowa, Missouri, Nebraska, Kansas, Colorado, Minnesota, Alabama, Florida, Mississippi, Texas, Montana, Utah and Oregon.³ Under the statutes of

from getting on the track of the railroad from the lands adjoining the same." The material parts of the new "Railroad Law" of 1892 (§ 32) are as follows: "Every railroad corporation, and any lessee or other person in possession of its road, shall, before the lines of its road are opened for use, and so soon as it has acquired the right of way for its roadway, erect and thereafter maintain fences on the sides of its road of the height and strength sufficient to prevent cattle, horses, sheep and hogs from going upon its road from the adjacent lands with farm-crossings and openings with gates therein at such farm-crossings whenever and wherever reasonably necessary for the use of the owners and occupants of the adjoining lands, and shall construct, where not already done, and hereafter maintain, cattle-guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs from going upon its railroad. So long as such fences are not made, or are not in good repair, the corporation, its lessee or other person in possession of its road, shall be liable for all damages done by their agents or engines or cars to any domestic animals thereon. When made and in good repair, they shall not be liable for any such damages, unless negligently or willfully done. A sufficient post and wire fence of requisite height shall be deemed a lawful fence within the provisions of this section; but barbed wire shall not be used in its construction. No railroad need be fenced, when not neces-

sary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands. Every adjoining land-owner, who, or whose grantor, has received compensation for fencing the line of land taken for a railroad, and has agreed to build and maintain a lawful fence along such line, shall build and maintain such fence. If such owner, his heir or assign, shall not build such fence, or if built, shall neglect to maintain the same during the period of thirty days after he has been notified so to do by the railroad corporation, such corporation shall thereafter build and maintain such fence, and may recover of the person neglecting to build and maintain it the expense thereof" (Stat. 1892, ch. 676, § 32; amending Stat. 1890, ch. 565, § 32).

³ *Maine*: Rev. Stat. (1891) ch. 51, § 36.

New Hampshire: Stat. 1850, ch. 953; Pub. Stat. 1891, ch. 159. See *Smith v. Eastern R. Co.*, 35 N. H. 356; *Horn v. Atlantic, etc. R. Co.*, Id. 169.

Vermont: Gen. Stat. 1894, §§ 3874-3878.

Massachusetts: Gen. Stat. 1860, ch. 63, § 43; Pub. Stat. 1882, ch. 112, § 115. See *Rogers v. Newburyport, etc. R. Co.*, 1 Allen, 16.

Connecticut: Gen. Stat. 1888, §§ 3505-3508. See *Gallagher v. New England R. Co.*, 57 Conn. 442; 18 Atl. 786.

New Jersey: Stat. April 2, 1873, § 32. See *Vanduzer v. Lehigh, etc. R. Co.*, 58 N. J. Law 8; 32 Atl. 376.

Virginia: Code, 1887, § 1258.

Ohio: Rev. Stat. §§ 3324-3326.

New York, and of most of the other states mentioned, this liability is absolute, without proof of any other negligence than

Kentucky: Stat. 1894, §§ 809, 1789–1799. See *Louisville, etc. R. Co. v. Simmons*, 85 Ky. 151; 3 S. W. 10.

Tennessee: Stat. 1891, ch. 101.

Indiana: R. S. 1894, § 5323, requires every railroad to be fenced sufficiently to keep out "stock" with barriers and cattle-guards at highway crossings; otherwise to be liable for all damages, etc. The old statute under which the decisions were all made, up to 1888, simply required the road to be "securely fenced" (Laws, 1859, p. 105).

Illinois: R. S., 1895, ch. 114, § 62. See *Galena, etc. R. Co. v. Crawford*, 25 Ill. 529; *Terre Haute, etc. R. Co. v. Augustus*, 21 Id. 186. Mules and asses are included under the term "horses" in this statute (*Ohio, etc. R. Co. v. Brubaker*, 47 Id. 462; *Toledo, etc. R. Co. v. Cole*, 50 Id. 184). The fencing should embrace the entire right of way (*Ohio, etc. R. Co. v. People*, 121 Ill. 483; 13 N. E. 236).

Michigan: Howell's Annot. St. 1882, § 3377, Supp. p. 3290. See *Gardiner v. Smith*, 7 Mich. 410.

Wisconsin: Laws of 1860, ch. 268, § 1 (now Annot. Stat. 1889, §§ 1810–1814; superseding L. 1872, ch. 119, § 30); see *McCall v. Chamberlain*, 13 Wisc. 637; criticised in *Pietzner v. Shinnick*, 39 Wisc. 129. The Wisconsin act of 1872, ch. 119, §§ 30, 31, was not repealed by L. 1875, ch. 248 (R. S. 1889, § 1813), which gave to occupants of inclosed lands an action for a penalty against a company for every train passing through their lands so long as its failure to fence continues. The act of 1875 was cumulative to that of 1872 (*Curry v. Chicago, etc. R. Co.*, 43 Wisc. 665).

Iowa: McClain's Annot. Stat. 1888, par. 1972. Code, § 1289. See

Hinman v. Chicago, etc. R. Co., 28 Iowa, 491. "Live stock" includes sheep (*Ib.*); and swine (*Lee v. Minneapolis, etc. R. Co.*, 66 Id. 131). The statute only protects "stock running at large" (*Valleau v. Chicago, etc. R. Co.*, 73 Id. 723; 36 N. W. 760; *Grove v. Burlington, etc. R. Co.*, 75 Iowa, 163; 39 N. W. 248; *Karr v. Chicago, etc. R. Co.*, 87 Iowa, 298; 54 N. W. 144).

Missouri: Gen. Stat. 1865, ch. 63, § 43. See *Burton v. North Missouri R. Co.*, 30 Mo. 372. The statute of 1865 applied only to farming lands and the open prairie, and not to railroads within cities and towns (*Cousins v. Hannibal, etc. R. Co.*, 66 Mo. 572; *Edwards v. Hannibal, etc. R. Co.*, Id. 567). Neither did it apply to uninclosed land, either cultivated or prairie (*Cary v. St. Louis, etc. R. Co.*, 60 Mo. 209; see *Bigelow v. North Mo. R. Co.*, 48 Id. 510, and other cases). But the distinction between uninclosed prairie lands and other uninclosed lands seems to have been removed by Mo. Laws, 1885, p. 88 (R. S. 1889, § 2611), which require every company to "erect and maintain lawful fences on the sides of the road where the same passes through, along or adjoining inclosed or cultivated fields or uninclosed lands." An action for damages for killing stock cannot be brought under both sections 2611 and 4428; it must be brought only under one of them (*Wood v. St. Louis, etc. R. Co.*, 58 Mo. 109). As to proper charge to jury, under the statute, see *Montgomery v. Wabash, etc. R. Co.*, 90 Mo. 446; 2 S. W. 409. Under Rev. St. 1879, § 809 (now § 2611), requiring railroad companies to fence their tracks where the same pass through uninclosed lands, and

the mere omission to fence;⁴ it is no defense that the animal injured was trespassing; nor, in general, that its owner con-

to provide cattle-guards at crossings, and making them liable for injuries to stock by reason of failure to do so, it is no defense to an action for such injuries that the unclosed grounds through which the tracks passed were used in connection with a depot, unless it appears that the erection of fences would interfere with the transaction of business or the convenience of the public (*Chouteau v. Hannibal*, etc. R. Co., 28 Mo. App. 556.)

Nebraska: Comp. St. Neb. 1895, § 4012, requires every company, within six months after its line of railroad or any part thereof is open, to erect and thereafter maintain fences on the sides thereof, sufficient to prevent cattle, horses sheep, and hogs from getting on the track, except at the crossings of public roads and highways, and within the limits of towns, cities and villages, etc. Held, that § 375, defining a "lawful fence," applies alone to the inclosing of lands and such "lawful fence," if inadequate for the purposes specified in the former section, does not relieve

the railroad from liability for stock killed (*Chicago*, etc. R. Co. v. *James*, 26 Neb. 194; 41 N. W. 992).

Kansas: Laws 1874, ch. 94; Gen. Stat. 1889, §§ 1252, 1317-1320. The statute is construed as requiring cattle-guards at highway crossings (*Atchison*, etc. R. Co. v. *Shaft*, 33 Kans. 521; *Union Pacific R. Co. v. Harris*, 28 Id. 206; see *Mo. Pacific R. Co. v. Morrow*, 33 Id. 217).

Colorado: Stat. 1891, § 3720.

Minnesota: Stat. 1874, §§ 2692, etc.

Alabama: Civil Code, 1886, § 1134. Formerly, in Alabama, a railroad company was absolutely liable for an injury to live stock by its trains; but now it has only to show that it has complied with the statute, and has not been negligent (see *Nashville*, etc. R. Co. v. *Peacock*, 25 Ala. 229). Companies were relieved from absolute liability by the acts of 1858 and 1881, and were subjected to liability only for negligence or failure to comply with the requirements of those statutes (*Nashville*, etc. R. Co. v. *Comans*, 45 Ala. 437; see Code of

⁴So held in *New York* (*Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42; *Tracy v. Troy*, etc. R. Co., 38 Id. 433); *Maine* (*Norris v. Androscoggin R. Co.*, 39 Me. 273); *New Hampshire* (*Smith v. Eastern R. Co.* 35 N. H. 356; *Cressey v. Northern R. Co.*, 59 Id. 564); *Vermont* (*Harwood v. Bennington*, etc. R. Co., 67 Vt. 664; 32 Atl. 721); *Virginia* (*Norfolk & W. R. Co. v. Johnson*, 91 Va. 661; 22 S. E. 505); *Tennessee* (*Cincinnati*, etc. R. Co. v. *Stonecipher*, 95 Tenn. 311; 32 S. W. 208); *Texas* (*Gulf*, etc. R. Co. v. *Keith*, 74 Tex. 287; 11 S. W. 1117; *Gulf*, etc. R. Co. v. *Hudson*, 77 Tex. 494; 14 S. W. 158);

Indiana: allegations as to negligence and willfulness are surplusage (*Cleveland*, etc. R. Co. v. *De Bolt*, 10 Ind. App. 174; 37 N. E. 737; *Jeffersonville*, etc. R. Co. v. *Dunlap*, 29 Ind. 426); *Illinois* (*Gallena*, etc. R. Co. v. *Crawford*, 25 Ill. 529; *Chicago*, etc. R. Co. v. *Uteley*, 38 Ill. 410); *Wisconsin* (*Blair v. Milwaukee*, etc. R. Co., 20 Wisc. 254; *McCall v. Chamberlain* 13 Id. 637; *Missouri* (*Donovan v. Hannibal*, etc. R. Co., 89 Mo. 147; 1 S. W. 232); *Nebraska* (*Union Pac. R. Co. v. High*, 14 Neb. 14; 14 N. W. 547); *Oregon* (*Hindman v. Oregon R. etc. Co.*, 17 Ore. 614; 22 Pac. 116).

tributed to the injury by his negligence;⁵ although it is a defense to show that he willfully took or left the animal on the railroad or otherwise intentionally exposed it to the injury.⁶ In earlier editions, we stated that most of the statutes did not impose such a stringent liability. But that is no longer the case; the course of recent legislation upon this subject having everywhere tended to an adoption of the New York rule. There are, no doubt, still some exceptions; but these may be left out of consideration in a general treatise.

§ 422. Application and validity of statutes.—These statutes do not apply to cases of injuries suffered before their enactment;¹ but they are generally made applicable to railroad companies previously chartered. It is within the constitutional power of a legislature to make the statute so applicable,² even though no right to amend the charter was

1876, § 1722). But the burden of proof is upon the company, an injury being shown, to show that the company has not been negligent, and has complied with the statute (*Mobile, etc. R. Co. v. Williams*, 53 Ala. 595; see *Alabama, etc. R. Co. v. Chapman*, 80 Ala. 615; 2 So. 738).

Florida: Railroad companies are required to fence their tracks. Double damages for stock killed allowed in case of failure to fence (Laws 1890-91, ch. 4069, p. 110). See complaint under statute, held good (*Jacksonville, etc. R. Co. v. Prior*, 34 Fla. 271; 15 So. 760).

Mississippi: Code 1892, § 3561; see *Kansas City, etc. R. Co. v. Spencer*, 72 Miss. 491; 17 So. 168.

Texas: Sayles' Rev. Stat. 1888, art.

4245, provides that every railroad company shall be liable to the owner for any stock killed or injured by the locomotives and cars of the company in running over their respective railways, unless the track is fenced. See *Gulf, etc. R. Co. v. Cash*, 8 Tex. Civ. App. 569; 8 S. W. 387.

Montana: Railroad companies are required to fence their tracks, under penalty of double damages for stock injured for want of fence (Laws 1891, p. 267).

Utah: Stat. 1890, ch. 52; amending Comp. Laws, 1888, § 2349. See *Stimson v. Union Pac. R. Co.*, 8 Utah, 349; 31 Pac. 449.

Oregon: Misc. Laws, §§ 4044-4049.

⁵ See § 451, *post*.

⁶ See § 452, *post*.

¹ *Indianapolis, etc. R. Co. v. Elliott*, 20 Ind. 430; *Evansville, etc. R. Co. v. Ross*, 12 Id. 446.

² *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; 6 Sup. Ct. 110; *Illinois*

Cent. R. Co. v. Crider, 91 Tenn. 489; 19 S. W. 618; *Wilder v. Maine, etc. R. Co.*, 65 Me. 333; *Chicago, etc. R. Co. v. Dumser*, 109 Ill. 402; *Louisville, etc. R. Co. v. Belcher*, 89 Ky. 193; 12 S. W. 195; *Kansas Pac. R. Co. v. Mower*, 16 Kans. 573.

reserved.³ It is also fully within the power of the legislature to exclude the defense of contributory negligence⁴ and to award double damages to the injured party.⁵ Such of these statutes as only mention "railroad corporations and their agents" do not impose any duty upon *individuals* owning or running a railroad in their own right.⁶ The plaintiff must prove every fact necessary to bring the company within the statute.⁷

§ 423. When fences must be put up.—When the statute prescribes no particular time within which a railroad fence must be put up, the statutory liability of the company for injuries to cattle begins as soon as it takes possession of the land upon which the road is to be laid.¹ The New York statute so prescribes in plain terms. This liability is not affected by the fact that the road is in the hands of a contractor who has nothing to do with the fencing.² In Missouri

³ *Staats v. Hudson Riv. R. Co.*, 4 Abb. Ct. App. 287; *Thorpe v. Rutland*, etc. R. Co., 27 Vt. 140; *Trice v. Hannibal*, etc. R. Co., 35 Mo. 188; s. c., again, 49 Id. 438; *O'Bannon v. Louisville*, etc. R. Co., 8 Bush, 348; and see *Madison*, etc. R. Co. v. *Whiteneck*, 8 Ind. 217; *New Albany*, etc. R. Co. v. *Tilton*, 12 Id. 3; *Jones v. Galena*, etc. R. Co., 16 Iowa, 6; *Bulkley v. New Haven R. Co.*, 27 Conn. 479; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164; *Sawyer v. Vermont*, etc. R. Co., 105 Mass. 196; *Suydam v. Moore*, 8 Barb. 358; *Talmadge v. Rensselaer*, etc. R. Co., 13 Id. 493.

⁴ *Quackenbush v. Wisconsin*, etc. R. Co., 62 Wisc. 411; 22 N. W. 519.

⁵ *Minneapolis*, etc. R. Co. v. *Beckwith*, 129 U. S. 26; 9 S. Ct. 207; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 522; 6 S. Ct. 110; overruling *Atchison*, etc. R. Co. v. *Baty*, 6 Neb. 37. Statutes imposing liability on railroads for cattle injured by trains, without any fault, have been held unconstitutional (*Schenck v. Union Pac. R. Co.*, Wyo. ; 40 Pac. 840; *Bielenberg v. Montana Union*

R. Co., 8 Mont. 271; 20 Pac. 314; *Denver*, etc. R. Co. v. *Outcalt*, 2 Colo. App. 395; 31 Pac. 177; *Zeigler v. South*, etc. R. Co., 58 Ala. 594; *Oregon R. Co. v. Smalley*, 1 Wash. St. 206; 23 Pac. 1008; *Ohio*, etc. R. Co. v. *Lackey*, 78 Ill. 55).

⁶ *Cooley v. Brainerd*, 38 Vt. 394. In New York, Ohio, and other states, the statutes expressly include "persons."

⁷ *Baxter v. Boston*, etc. R. Co., 103 Mass. 383.

¹ *Gardner v. Smith*, 7 Mich. 410; *Holden v. Rutland*, etc. R. Co., 30 Vt. 297; see *Clark v. Vermont*, etc. R. Co., 28 Id. 103. Where it was provided by deed that the company should make a good fence along its road within a reasonable time after the completion of the road, Held, that completion meant completion across the plaintiff's land, and not completion of the whole line (*Baltimore*, etc. R. Co. v. *McClellan*, 59 Ind. 440).

² *Pound v. Port Huron*, etc. R. Co., 54 Mich. 13; *Silver v. Kansas City R. Co.*, 73 Mo. 528.

liability begins when the cars begin to run.³ But in some states a railroad company is allowed six months from the opening of the road within which to complete its fences; and the statutory liability does not therefore commence until the expiration of that period.⁴ And if, before that period, the company puts up a fence, it is not liable, until after the six months elapse, for failing to maintain the fence.⁵

§ 424. Fences must be sufficient.—The fences, gates and cattle-guards must be sufficient under all circumstances which could reasonably be anticipated,¹ to keep out cattle, horses, sheep and hogs, whether good-tempered, vicious, or unruly;² but it is not necessary that they should be invariably strong enough to keep out an animal unusually frightened and excited.³

³ *Cobb v. Kansas City, etc. R. Co.*, 43 Mo. App. 313; see *Comings v. Hannibal, etc. R. Co.*, 48 Mo. 512.

⁴ So in Illinois (Rev. stat. 1895, ch. 114, p. 48; see *Ohio, etc. R. Co. v. Meisenheimer*, 27 Ill. 30; *Chicago, etc. R. Co. v. Diehl*, 52 Id. 441; *Rockford, etc. R. Co. v. Connell*, 67 Id. 216); in Nebraska (Comp. Stats. 1895, § 4012), and from 1874 to 1881 in Ohio (Baltimore, etc. R. Co. v. McElroy, 35 Ohio St. 147); but not since (Rev. Stat. 1896, § 3324).

⁵ *Toledo, etc. R. Co. v. Miller*, 45 Ill. 42.

¹ The statute does not require a cattle-guard to be so built that under no circumstances can an animal cross it; but simply so that under ordinary circumstances it shall be sufficient to prevent animals from getting on the track (*Wait v. Bennington, etc. R. Co.*, 61 Vt. 268; 17 Atl. 284). *S. P., Jones v. Chicago, etc. R. Co.*, 59 Mo. App. 137 [horse jumped over]. A statute requiring railroad companies to maintain a sufficient fence without prescribing what a sufficient fence shall be, must be considered as adopting the general law fixing the standard of lawful fences (*Enright*

v. San Francisco, etc. R. Co., 33 Cal. 230). A fence over the bed of a creek full of water, which by evaporation dries up and leaves a space under the bottom wire, through which cattle get on the track, is not sufficient (*Selders v. Kansas, etc. R. Co.*, 19 Mo. App. 335). The sufficiency of the fence is not impaired by leaving gates in it; nor does it come in question where cattle have got upon the track by going through a gate when open (*Detroit, etc. R. Co. v. Hayt*, 55 Mich. 347; 21 N. W. 367, 911). Where, for the convenience of the adjacent owner, gates are put in at a private crossing, as to him the track will be considered as "securely fenced;" but as to other persons the company is bound at its peril to keep the gates closed (*Wabash, etc. R. Co. v. Williamson*, 104 Ind. 154; 3 N. E. 814). As to insufficient gates, see *Butler v. Chicago, etc. R. Co.*, 71 Iowa, 206; 32 N. W. 262. Willow trees are not a sufficient fence (*Brock v. Connecticut, etc. R. Co.*, 35 Vt. 374).

² *Chicago, etc. R. Co. v. Utley*, 38 Ill. 410.

³ *Chicago, etc. R. Co. v. Utley*, 38 Ill. 410.

The fences must be high enough to prevent horses or cattle from jumping over them,⁴ close enough to prevent sheep and hogs, however small, from clambering through them,⁵ and sufficient to keep out all kinds of animals that would be kept from the track by an ordinary fence, without reference to the question whether they are large enough to throw a train off the track.⁶ But fences need not be made so as to keep out dogs.⁷ Cattle-guards must be adequate in design and material,⁸ and sufficiently close to the crossing to make them effective for their purpose;⁹ but a cattle-guard need not be sunk at the precise place where it would be most efficient, if great inconvenience would ensue therefrom to the working of the railroad.¹⁰ In Minnesota, a barbed wire fence, constructed in accordance with the statute relating to wire fences, is a compliance with a statute requiring "good and substantial fences;"¹¹ but in Georgia, the dangerous character of such fences is recognized, and, if a company uses them, it is held to the exercise of due care not to precipitate animals upon them through fear

⁴ In *Bessant v. Great Western R. Co.* (8 C. B. N. S. 368), plaintiff recovered for twenty-five sheep which had made their way through a small gap in the hedge. Byles, J., added that he remembered a case in which a plaintiff had recovered and retained a verdict against a railway company for a bull which had jumped over a fence six feet high.

⁵ In *Halverson v. Minneapolis, etc. R. Co.* (32 Minn. 88), plaintiff recovered for the killing of a hog which was about fifteen inches high. See last note; also *Lee v. Minneapolis, etc. R. Co.* 66 Iowa, 131; 23 N. W. 299; *Missouri Pac. R. Co. v. Bradshaw*, 33 Kans. 533; 6 Pac. 917.

⁶ *Indianapolis, etc. R. Co. v. Marshall*, 27 Ind. 300.

⁷ *Wilson v. Wilmington, etc. R. Co.*, 10 Rich. Law, 52; *Texas etc. R. Co. v. Scott* [Tex.], 17 S. W. 1116.

⁸ A cattle-guard must extend the whole width of the right of way (*Kansas, etc. R. Co. v. Spencer*, 72

Miss. 491; 17 So. 168). See *N. Y., Chicago, etc. R. Co. v. Zumbaugh*, 11 Ind. App. 107; 38 N. E. 531; *Strong v. Chicago, etc. R. Co.*, 95 Iowa, 278; 63 N. W. 699 [iron guards sufficient].

⁹ Where a company, by constructing its guards at a distance from the line of the highway, thus exposes its tracks, and increases the danger, it renders itself liable for damage occasioned thereby (*Parker v. Lake Shore, etc. R. Co.*, 93 Mich. 607; 53 N. W. 834). "If, as in this case, they are placed 75 or 100 feet distant from the crossings, they will not accomplish the purpose and object for which they are required" (*Evansville, etc. R. Co. v. Barbee*, 74 Ind. 169). To similar effect, *Indianapolis, etc. R. Co. v. Bonnell*, 42 Ind. 539.

¹⁰ *Indianapolis, etc. R. Co. v. Irish*, 26 Ind. 268.

¹¹ *Halverson v. Minneapolis, etc. R. Co.*, 32 Minn. 88; 19 N. W. 392; see *Fitzgerald v. St. Paul, etc. R. Co.* 29 Minn. 336; 13 N. W. 168.

of its trains.¹² The latter rule is, in our opinion, the proper one. In New York, barbed wire is prohibited.¹³ Some statutes prescribe the exact kind of fence, etc., to be put up. In such cases, the company is, of course, not bound to do more; and even if it fails to do as much, yet if full compliance would not have prevented the injury, it is held in Kansas that no liability ensues;¹⁴ but not so in Texas.¹⁵

§ 425. Fences must be maintained.—These fences, gates and cattle-guards must be not only erected, but *maintained*.¹ And, therefore, if an opening is made in the fence or cattle-guard, whether with or without the consent or fault of the railroad company,² the company is absolutely liable for injuries to cattle entering through the breach, after it has had actual or constructive notice thereof and a reasonable time to repair.³ But we presume that a plaintiff could not recover in any such case if the breach was the result of his own act or neglect.⁴

¹² Atlanta, etc. R. Co. v. Hudson, 62 Ga. 679.

¹³ Railroad Law, 1892.

¹⁴ Leebrick v. Republican Val. etc. R. Co., 41 Kans. 756; 21 Pac. 796. Where the evidence does not conclusively show that a lawful fence would not have prevented the stock from getting on the track, it is for the jury to find whether the failure to maintain a lawful fence was the cause of the injury (Alexander v. Chicago, etc. R. Co., 41 Minn. 515; 43 N. W. 481).

¹⁵ Gulf, etc. R. Co. v. Hudson, 77 Tex. 494; 14 S. W. 158.

¹ Bennett v. Wabash, etc. R. Co., 61 Iowa, 355; 16 N. W. 210. A gate is part of a fence and must be maintained as such (Mackie v. Central R. Co., 54 Iowa, 540; 6 N. W. 723; McKinley v. Chicago, etc. R. Co., 47 Iowa, 76; Chicago, etc. R. Co. v. Morton, 55 Ill. App. 144).

² In Munch v. N. Y. Central R. Co. (29 Barb. 647), it clearly appeared that the breach was the act of a trespasser, and the plaintiff re-

covered judgment. To the same effect, see Brown v. Milwaukee, etc. R. Co., 21 Wisc. 39; Chicago, etc. R. Co. v. Reid, 24 Ill. 144; Bartlett v. Dubuque, etc. R. Co., 20 Iowa, 188. So, where a gap had been made by some one, but by whom it did not appear, it was held to be for the jury to determine whether the company was in fault for not repairing (Indianapolis, etc. R. Co. v. Snelling, 16 Ind. 435). So where fences are broken down by fire or storms (Cleveland, etc. R. Co. v. Brown, 45 Ind. 90; Peet v. Chicago, etc. R. Co., 88 Iowa, 520; 55 N. W. 508).

³ Cases cited, *infra*.

⁴ Whether the mode adopted for securing the gate was reasonably judicious, and whether the plaintiff was culpably negligent in suffering his cattle to remain in a field insufficiently fenced from the railroad, or in having failed to give notice to the company of the defect, were questions of fact, properly submitted to the jury (Poler v. N. Y. Central R. Co. 16 N. Y. 476).

Only reasonable or ordinary diligence is generally required of railroad companies in the maintenance of their fences.⁵ They are allowed a reasonable time to acquire notice of defects,⁶ and a reasonable time for repairs, but no more. If, within such reasonable time, the fence is repaired, the company is not liable, under the statute, for cattle entering meantime through the breach.⁷ But after that time, its full liability revives.⁸ In

⁵ *Lemmon v. Chicago, etc. R. Co.*, 32 Iowa, 151; *Chicago, etc. R. Co. v. Barrie*, 55 Ill. 226. This is, we think, the general and true rule. But in Wisconsin, a *high degree* of diligence is said to be required (*Antisdel v. Chicago, etc. R. Co.*, 26 Wisc. 145). Plaintiff's cow went upon the track in the evening, through bars which were found afterwards to be partly down, but no proof was given to show how they came to be down, and there was evidence that one of the witnesses passed through them that evening and put them up. Held error to instruct the jury that "the defendant is under the statute bound to take notice if any part of its fence gets out of repair or if any bars or gates at farm-crossings are defective, and is liable for all accidents to stock arising through such defects, whether it had actual notice or not" (*Grand Rapids, etc. R. Co. v. Monroe*, 47 Mich. 152; 10 N. W. 179). The company is not bound to watch its fences all night (*Illinois Central R. Co. v. Dickerson*, 27 Ill. 55). Where fences had been accidentally destroyed by fire after the track inspector had made his daily inspection, and the fact was not known until after the injury to plaintiff's cattle, the company was not liable (*Toledo, etc. R. Co. v. Eder*, 45 Mich. 329). Where the fence was found to be secure a short time before plaintiff's hogs were killed, and planks were torn off by strangers, leaving holes in the fence in spite of

the watchfulness of the company, it was held not to be liable (*Case v. St. Louis, etc. R. Co.*, 75 Mo. 668; see *Walthers v. Mo. Pacific R. Co.*, 78 Mo. 617).

⁶ *Hodge v. N. Y. Central R. Co.* 27 Hun, 394; *Clardy v. St. Louis, etc. R. Co.*, 73 Mo. 576.

⁷ "Where fences are out of repair, and have been for such a length of time that the company will be presumed to have notice through its agents and servants, they are then chargeable with negligence, as having had constructive notice. Unless the company has actual or constructive notice of the defect in the fences, or is guilty of negligence in not making proper examination for the purpose of seeing whether the fences are in repair, there can be no recovery (*Hodge v. N. Y. Central R. Co.*, 27 Hun, 394). To same effect, *Toledo, etc. R. Co. v. Daniels*, 21 Ind. 256; *Indianapolis, etc. R. Co. v. Truitt*, 24 Id. 162; *Toledo, etc. R. Co. v. Fowler*, 22 Id. 316; *Illinois Central R. Co. v. Swearingen*, 33 Ill. 289; s. c., again, 47 Ill. 206; *Indianapolis, etc. R. Co. v. Hall*, 88 Id. 368; *Aylesworth v. Chicago, etc. R. Co.*, 30 Iowa, 459; see *Poler v. N. Y. Central R. Co.*, 16 N. Y. 476; *Murray v. N. Y. Central R. Co.*, 3 Abb. Ct. App. 339; *Spinner v. Same*, 67 N. Y. 153. See also *Brentner v. Chicago, etc. R. Co.*, 58 Iowa, 625; 12 N. W. 615; *Robinson v. Grand Trunk R. Co.*, 32 Mich. 322.

⁸ Notice may be inferred from the lapse of time (*Taft v. New York, etc.*

Ontario, railroad companies are held to a stricter rule, and required to keep up a constant inspection of their fences and to repair at once, without notice.⁹ Where the breach is made by the railroad company itself, though for a necessary purpose (*c. g.*, to build a bridge), it is liable for cattle straying through at any time afterward.¹⁰ And if the company allows the use of a gate by its customers or the public, at a point not excepted by the statute, it is responsible, even if the gate is left open by a stranger.¹¹

R. Co., 157 Mass. 297; 32 N. E. 168 [two years]; Illinois Cent. R. Co. v. Arnold, 47 Ill. 173 [three months]; McDowell v. N. Y. Central R. Co., 37 Barb. 195 [two months]; Graves v. Chicago, etc. R. Co., 47 Minn. 429; 50 N. W. 474 [one month]). Where a portion of the fence was burned, one week's delay was held to be unreasonable (Cleveland, etc. R. Co. v. Brown, 45 Ind. 90); and so in a similar case was a delay to repair from Thursday to Sunday (Toledo, etc. R. Co. v. Cohen, 44 Ind. 444). Delay for even a few hours *may* be unreasonable (Anderson v. Chicago, etc. R. Co., 93 Iowa, 561; 61 N. W. 1058); and has been so found by juries, and the verdict sustained (*Id.*; Peet v. Chicago, etc. R. Co., 88 Iowa, 520; 55 N. W. 508). It is error for the court by its instructions to withhold this question of reasonable time from the jury (McCormick v. Chicago, etc. R. Co., 41 Iowa, 193). The burden of showing that the company did not repair within a reasonable time is usually held to be upon the plaintiff (Perry v. Dubuque, etc. R. Co., 36 Iowa, 102; Aylesworth v. Chicago, etc. R. Co., 30 Id. 459; Wheeler v. Erie R. Co., 2 Thomp. & C. 634). But in Indiana, the excuse that a reasonable time to repair the fence has not elapsed must be pleaded and proved by the company (Jeffersonville, etc. R. Co. v. Sullivan, 38 Ind. 262). The plaintiff has in any case a clear

right to show the condition of the fence for some considerable time before the accident, for the purpose of charging the company with notice of its defective condition (Jones v. Chicago, etc. R. Co., 49 Wisc. 352).

⁹ Studer v. Buffalo, etc. R. Co., 25 Upper Canada [Q. B.], 160.

¹⁰ Indianapolis, etc. R. Co. v. Logan, 19 Ind. 294. A, a day laborer for defendant, for his own purposes, took down bars of a way across defendant's road, and omitted to replace them. Held, that it was part of A's duty, as a servant to put up the bars, and that the defendant was liable for his neglect to do so (Chapman v. N. Y. Central R. Co., 31 Barb. 399; *aff'd*, 33 N. Y. 369). A complaint was held sufficient which alleged that the fence along the railroad took fire, and the servants of the defendant, to extinguish the fire, threw down the fences, making a gap therein, which was negligently left open by said servants, they seeing the plaintiff's cattle in a pasture adjacent, so that the cattle escaped upon the track, and were killed (Indianapolis, etc. R. Co. v. Truitt, 24 Ind. 162).

¹¹ Plaintiff's cattle escaped from his enclosure in the night to the highway, and thence through a gate left open at the side of defendant's road, upon the track, where they were struck by a train. The gate had been used for years in loading

§ 426. **Frightening animals on fenced roads.** — The authority given by its charter to use steam or electric power necessarily confers upon a railroad company the right to make all such noises as are unavoidably connected with that use.¹ Some of these noises, such as the jar and rush of a train in motion, are continuous and inseparable from motion. Others, such as blowing off steam, sounding bells, whistles or other signals, or dropping cinders, are only occasionally necessary, and can be regulated. A railroad company which has complied with the fence laws, so far as applicable to it, is not responsible for fright taken by animals from unavoidable noises,² unless it has omitted to give some warning, required by statute, or by ordinary prudence, on approaching a place where animals are seen, or should reasonably be expected. If, in consequence of the sudden appearance of the train without such proper warning, animals are frightened, the com-

freight and left open until late at night. Held, that the company had sufficient notice that the gateway had been diverted from its original purpose; that the opening of it at all by its assent was in contravention of the New York railroad act, by which no exception is made in favor of openings or gates for the use of the company, its customers or the public generally; and if such use of a gate at a farm-crossing is permitted so that the gate does not serve as a fence, the company is in default and liable for injury thereby caused (*Spinner v. N. Y. Central R. Co.*, 67 N. Y. 153). Where the road had been fenced, but a panel had been cut out and made into a gate, but not hung on hinges, and was used without objection from the company, and the gate was so set up that plaintiff's hogs passed through on the track and were killed, the company was liable (*Cleveland, etc. R. Co. v. Swift*, 42 Ind. 119). Compare *Savage v. Chicago, etc. R. Co.*, 31 Minn. 419; 18 N. W. 272.

¹ *Burton v. Philadelphia, etc. Co.*, 4 Harringt. 252; see *Culp v. Atchison, etc. R. Co.*, 17 Kans. 475; *Cincinnati, etc. R. Co. v. Gaines*, 104 Ind. 526; *Hill v. Portland, etc. R. Co.*, 55 Me. 438; *Chicago, etc. R. Co. v. Dickson*, 88 Ill. 431; *Atchison, etc. R. Co. v. Loree*, 4 Neb. 446; *Ohio, etc. R. Co. v. Cole*, 41 Ind. 331; *Baltimore, etc. R. Co. v. Thomas*, 60 Id. 107; *Hahn v. So. Pac. R. Co.*, 51 Cal. 605; and cases in next note.

² *Norton v. Eastern R. Co.*, 113 Mass. 366; *Favor v. Boston, etc. R. Co.*, 114 Id. 350 [railroad passing over highway by a bridge]; *Abbot v. Kalbus*, 74 Wisc. 504; 43 N. W. 367; *New Orleans, etc. R. Co. v. Thornton*, 65 Miss. 256; 3 So. 654; *McCerren v. Alabama, etc. R. Co.* 72 Miss. 1013; 18 So. 420 [hand car]; *Leavitt v. Terre Haute, etc. R. Co.*, 5 Ind. App. 513; 31 N. E. 860; [smoke]. So also as to electric street railways (*Doster v. Charlotte St. R. Co.*, 117 N. C. 651; 23 S. E. 449; *Kankakee Electric R. Co. v. Lade*, 56 Ill. App. 454).

pany is responsible.³ Neither is the company responsible for the fright caused by its giving, with ordinary care, signals required by statute,⁴ or by ordinary prudence,⁵ upon the approach of its trains. But such noises as blowing whistles,⁶

³ So held, in cases where horses, under the control of drivers, were frightened by the sudden approach of trains without making the statutory signals (*Voak v. Northern Central R. Co.*, 75 N. Y. 320 [horse alarmed by whistle]; *Cosgrove v. N. Y. Central R. Co.*, 87 Id. 88 [no noise except moving train]; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Wakefield v. Connecticut, etc. R. Co.*, 37 Vt. 330; *Ransom v. Chicago, etc. R. Co.*, 62 Wisc. 178; *Maher v. Winona, etc. R. Co.*, 31 Minn. 401; *Texas, etc. R. Co. v. Chapman*, 57 Tex. 75). And so, where no statute applied to the case, but common sense demanded the signal (*Edson v. Central R. Co.* 40 Iowa, 47). To similar effect, *Carraher v. San Francisco Bridge Co.*, 100 Cal. 177; 34 Pac. 828. A horse took fright from a distant train moving, by force of gravitation, at eight or ten miles an hour, no signal bells being given. Held, that it did not appear that the management of the cars was the cause of the accident (*Flint v. Norwich, etc. R. Co.*, 110 Mass. 222).

⁴ *Bailey v. Hartford, etc. R. Co.*, 56 Conn. 444; 16 Atl. 234; *Cahoon v. Chicago, etc. R. Co.*, 85 Wisc. 570; 55 N. W. 900 [whistle at crossing]; *Phillips v. N. Y. Central R. Co.*, 84 Hun, 412; 32 N. Y. Supp. 299; *Heininger v. Great Northern R. Co.*, 59 Minn. 458; 61 N. W. 558. If an engineer was justified, as a reasonably prudent man, in concluding, from the conduct of a team near a railroad crossing, that it would not be frightened by signals required for the management of the train, he was not negligent in giving

them (*Ocheltree v. Chicago, etc. R. Co.*, 96 Iowa, 246; 64 N. W. 788). The statutory signal must be given, though it may frighten a team on the highway, causing damages (*Louisville, etc. R. Co. v. Stanger*, 7 Ind. App. 179; 34 N. E. 688).

⁵ *Bailey v. Hartford, etc. R. Co.*, 56 Conn. 444; 16 Atl. 234; *St. Louis, etc. R. Co. v. Ferguson*, 57 Ark. 16; 20 S. W. 545. As a train was approaching a crossing at a rapid rate, the engineer saw a team approaching the track; he sounded the whistle; the horses took fright and ran in front of the engine; the company was held not liable (*Schaefer v. Chicago, etc. R. Co.*, 62 Iowa, 624; 17 N. W. 893). s. p., *Pepper v. Southern Pac. Co.*, 105 Cal. 389; 38 Pac. 974. The blowing of a whistle once, in a part of Philadelphia not much built, where there were short curves and several road crossings and a draw-bridge but a few blocks away, was not regarded as sufficient evidence of negligence, though it caused the horse to run away (*Philadelphia, etc. R. Co. v. Stinger*, 78 Pa. St. 219).

⁶ So held, where whistle was blown, without any sufficient reason (*Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259 [whistle under road bridge]; *Georgia Railroad Co. v. Thomas*, 73 Ga. 350); or blown furiously or repeatedly without necessity (*Gibbs v. Chicago, etc. R. Co.*, 26 Minn. 427; 4 N. W. 819; *Fritts v. New England R. Co.*, 27 Conn. 503; 26 Atl. 347). The cases are uniform in holding the company liable in similar cases (*Philadelphia, etc. R. Co. v. Killips*, 88 Pa. St. 405; *Wal-*

sounding loud bells,⁷ or letting off steam,⁸ made without necessity, when animals are near and likely to be frightened, and when ordinary care would have permitted and dictated a postponement of the noise until the animals were out of hearing, will sustain a verdict of negligence.⁹ So the company is responsible for injuries resulting from fright caused to animals by negligently dropping hot cinders upon them,¹⁰ or from

ker v. Boston & M. R. Co., 64 N. H. 414; 13 Atl. 649; Borst v. Lake Shore, etc. R. Co., 66 N. Y. 639; Chicago, etc. R. Co. v. Dunn, 52 Ill. 451; Chicago, etc. R. Co. v. Dickson, 88 Id. 431; Georgia R. Co. v. Newsome, 60 Ga. 492; Culp v. Atchison, etc. R. Co. 17 Kans. 475; Burton v. Philadelphia, etc. R. Co., 4 Harrington, 252; Hill v. Portland, etc. R. Co., 55 Me. 438; Billman v. Indianapolis, etc. R. Co., 76 Ind. 166; Louisville, etc. R. Co. v. Schmidt, 81 Ind. 264; Stott v. Grand Trunk R. Co., 24 Upper Canada [C. P.], 347). Excessive whistling, even at a crossing where the statute requires whistling (Bittle v. Camden, etc. R. Co., 55 N. J. Law, 615; 28 Atl. 305; St. Louis, etc. R. Co. v. Lewis, 60 Ark. 409; 30 S. W. 765, 1135). S. P., Gulf, etc. R. Co. v. Box, 81 Tex. 670; 17 S. W. 375). There can be no recovery without proof that the whistle was negligently sounded (Barron v. Chicago, etc. R. Co., 89 Wisc. 79; 61 N. W. 303).

¹ Negligence is not to be imputed to a motorman for ringing a gong when he sees a carriage ahead of his car; but if the horse is frightened, and danger is apparent, it is his duty to cease sounding the gong and stop his car (Galesburg Electric Co. v. Manville, 61 Ill. App. 490).

⁸ At a railway crossing on a level where there was considerable traffic the engine driver blew off the steam from the mud cocks, so as to frighten

horses waiting to pass over the line. Held, sufficient to warrant a verdict against the company (Manchester, etc. R. Co. v. Fullarton, 14 C. B. N. S. 54). To similar effect, Presby v. Grand Trunk Ry., 66 N. H. 615; 22 Atl. 554; Omaha, etc. R. Co. v. Clark, 35 Neb. 867; 53 N. W. 970; Chicago, etc. R. Co. v. Heinrich, 157 Ill. 388; 41 N. E. 860; Scaggs v. Delaware, etc. Canal Co., 74 Hun, 198; 26 N. Y. Supp. 323 [question for jury]. It is peculiarly negligent to blow off steam while running parallel to a highway (Lamb v. Old Colony R. Co., 140 Mass. 79; 2 N. E. 932).

⁹ It must appear, not only that the opening of the valve was unnecessary, but that it was done under such circumstances as to imply a failure to exercise that care which a prudent and reasonable man would exercise under such circumstances (Omaha, etc. R. Co. v. Clark, 39 Neb. 65; 57 N. W. 545; Omaha, etc. R. Co. v. Brady, 39 Neb. 27; 57 N. W. 767; Stanton v. Louisville, etc. R. Co., 91 Ala. 382; 8 So. 798). So as to whistling or letting off steam (Toledo, etc. R. Co. v. Crittenden, 42 Ill. App. 469). "Necessity" is ample justification for letting off steam (Louisville, etc. R. Co. v. Schmidt, 134 Ind. 16; 33 N. E. 774; Oxford Lake Line v. Steadham, 101 Ala. 376; 13 So. 553; Duvall v. Baltimore, etc. R. Co., 73 Md. 516; 21 Atl. 496; [automatic safety-valve]).

¹⁰ Lowery v. Manhattan R. Co., 99 N. Y. 158; 1 N. E. 108.

unlawful encroachments of its cars¹¹ or other property¹² upon the highway, having a tendency to frighten such animals. It is not thus liable, however, where the encroachment is caused, by no fault of its own,¹³ by such an accident as the overturn of cars, if it has used reasonable diligence to remove them.¹⁴ When fright is thus caused to an animal, by the fault of the company, it is liable for all injuries which the animal naturally inflicts upon itself, or upon other property, by running away.¹⁵

§ 427. Duty to signal to cattle.—Although the statutes requiring railroad companies to ring bells or sound whistles when approaching road-crossings are not enacted with primary reference to cattle, yet property, as well as persons, is within their protection.¹ A company which omits such signals is liable for the value of domestic animals, which (without contributory negligence)² are injured by its train, if the jury are of opinion, upon sufficient evidence to that effect, that the cattle would have escaped if the proper signals had been given. Mere proof of the coincident failure to give signals and injury to animals is, however, not enough. That proves negligence; but there must still be something to show that the

¹¹ *Harrell v. Albermarle, etc. R. Co.*, 110 N. C. 215; 14 S. E. 687; *Cleveland, etc. R. Co. v. Wynant*, 119 Ind. 539; 20 N. E. 730; *Andrews v. Mason City, etc. R. Co.*, 77 Iowa, 669; 42 N. W. 513. Though the company had the right to extend a switch track into the highway, it tended to prove negligence that the company left a car on such track within the limits of the highway for several days, whereby plaintiff's horses were frightened and he was injured (*Bussian v. Milwaukee, etc. R. Co.*, 56 Wisc. 325; 14 N. W. 452).

¹² *Hanson v. Chicago, etc. R. Co.*, 94 Iowa, 409; 62 N. W. 788; *Tinker v. Ontario, etc. R. Co.*, 71 Hun, 431; 24 N. Y. Supp. 977 [timber].

¹³ *Cleveland, etc. R. Co. v. Wynant*, 114 Ind. 525; 17 N. E. 118.

¹⁴ *Pittsburgh, etc. R. Co. v. Taylor*, 104 Pa. St. 306.

¹⁵ *Lowery v. Manhattan R. Co.*, 99 N. Y. 158; *Billman v. Indianapolis, etc. R. Co.*, 76 Ind. 166.

¹ *Voak v. Northern Central R. Co.*, 75 N. Y. 320.

² *Parker v. Lake Shore, etc. R. Co.*, 93 Mich. 607; 53 N. W. 834; *Scott v. Yazoo, etc. R. Co.*, 72 Miss. 37; 16 So. 205; *Chicago, etc. R. Co. v. Fenn*, 3 Ind. App. 250; 29 N. E. 790; *Kansas City, etc. R. Co. v. Cravens*, 43 Kans. 650; 23 Pac. 1044; *Palmer v. St. Paul, etc. R. Co.*, 38 Minn. 415; 38 N. W. 100; *Barr v. Hannibal, etc. R. Co.*, 30 Mo. App. 248; *McCormick v. Kansas City, etc. R. Co.* 50 Mo. App. 109. A dog is within the statute requiring the sounding of the whistle when an animal is seen on a railroad track (*Fink v. Evans*, 95 Tenn. 413; 32 S. W. 307).

negligent omission to signal was a proximate cause of the injury.³ But as it is well known that animals will usually run away on hearing a loud railroad signal, it would be sufficient to prove that they were so situated that they would have run had the proper signals been given.⁴ The question is then for the jury, not for the court.⁵ When a railroad engineer actually becomes aware of the presence of animals upon⁶ or dangerously near the track,⁷ it is clearly his duty, irrespective of any statute, to sound an alarm again and again, if necessary to drive them off,⁸ unless he comes upon them so suddenly that it is absolutely useless to do so.⁹ Or the omission may be otherwise excused, as unavoidable.¹⁰

§ 428. Care towards trespassing cattle.—When, for any reason, cattle have no right to be upon the track, and the railroad company is not in fault for want of a proper fence, the company is nevertheless liable for injuries caused to such cattle by its trains, if wantonly or recklessly¹ committed by

³ *Fisher v. Pennsylvania R. Co.*, 126 Pa. St. 293; 17 Atl. 607; *Illinois Central R. Co. v. Phelps*, 29 Ill. 447; *Pittsburgh, etc. R. Co. v. Karns*, 13 Ind. 87; *Douglass v. East Tennessee, etc. R. Co.*, 88 Ga. 282; 14 S. E. 616; *Louisville, etc. R. Co. v. Ousler* [Ind. App.], 36 N. E. 290; *Jackson v. Chicago, etc. R. Co.*, 36 Iowa, 451; *Atchison, etc. R. Co. v. Bell*, 52 Kans. 134; 34 Pac. 350. In Missouri, if plaintiff only proves the injury to cattle and the failure to ring or whistle, as required by statute, it is the duty of the court to declare, as matter of law, that he cannot recover (*Wallace v. St. Louis, etc. R. Co.*, 74 Mo. 594; *Holman v. Chicago, etc. R. Co.*, 62 Id. 562; *Stoneman v. Atlantic, etc. R. Co.*, 58 Id. 503).

⁴ *Chicago, etc. R. Co. v. Henderson*, 66 Ill. 494; *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291; 24 Pac. 661; *Missouri Pac. R. Co. v. Stevens*, 35 Kans. 622; 12 Pac. 25; *Chicago, etc. R. Co. v. Fenn*, 3 Ind. App. 250; 29 N. E. 790; *Texas, etc.*

R. Co. v. Cunningham, 4 Tex. Civ. App. 262; 23 S. W. 332.

⁵ *Chicago, etc. R. Co. v. McDaniels*, 63 Ill. 123; see *Great Western R. Co. v. Geddis*, 33 Id. 304; *Toledo, etc. R. Co. v. Foster*, 43 Id. 415; *Chicago, etc. R. Co. v. Cauffman*, 38 Id. 424.

⁶ Failure to blow the whistle on discovering stock upon the track, about 80 yards ahead, is sufficient to warrant a jury in finding negligence, although it appears that the air brakes were immediately applied (*Eddy v. Evans*, 58 Fed. 151; 7 C. C. A. 129).

⁷ *Cleveland, etc. R. Co. v. Rice*, 48 Ill. App. 51; *Edson v. Central R. Co.*, 40 Iowa, 47; *Illinois Cent. R. Co. v. Person*, 65 Miss. 319; 3 So. 375.

⁸ *Aycock v. Wilmington, etc. R. Co.*, 6 Jones, Law, 231.

⁹ See *post*, § 429.

¹⁰ *Mobile, etc. R. Co. v. Caldwell*, 83 Ala. 196; 3 So. 445.

¹ In many cases, it is said that gross negligence, wantonness, reck-

its servants in charge of such trains, or if they could have avoided such injuries by the use of ordinary care,² after they knew,³ or, in the exercise of ordinary care, should have known,⁴ of the presence of cattle upon the track or dangerously near to it; but not otherwise.⁵ Ordinary care, however, does not

lessness or willful injury must be shown (Indianapolis, etc. R. Co. v. McClure, 26 Ind. 370; Baltimore, etc. R. Co. v. Mulligan, 45 Md. 486; Illinois Central R. Co. v. Phelps, 29 Ill. 447; Vandegrift v. Rediker, 22 N. J. L. 185; Louisville, etc. R. Co. Ballard, 2 Metc. [Ky.] 177; Vanhorn v. Burlington, etc. R. Co. 63 Iowa, 67; 18 N. W. 679; Maynard v. Boston, etc. R. Co., 115 Mass. 458; Missouri Pac. R. Co. v. Dunham, 68 Tex. 231; 4 S. W. 472; and other cases, cited under § 430, *post*). But these expressions are all inaccurate and misleading (§§ 99, 100, *ante*).

² Ordinary care, "no more, no less," is required, when cattle are trespassing, or even present in violation of positive law. "No less" was held in Gulf, etc. R. Co. v. Washington, 49 Fed. 347; 4 U. S. App. 121; 1 C. C. A. 286; Granby v. Mich. Central R. Co., 104 Mich. 403; 62 N. W. 579; Bostwick v. Minneapolis, etc. R. Co., 2 N. D. 440; 51 N. W. 781; Central R. Co. v. Summerford, 87 Ga. 626; 13 S. E. 588; Louisville, etc. R. Co. v. Rice, 101 Ala. 676; 14 So. 639; Chicago, etc. R. Co. v. Legg, 32 Ill. App. 218; Austin, etc. R. Co. v. Saunders, Tex. Civ. App. ; 26 S. W. 128. "No more" is held in East Tennessee, etc. R. Co. v. Daniel, 91 Ga. 768; 18 S. E. 22; Richmond, etc. R. Co. v. Buice, 88 Ga. 180; 14 S. E. 205; Nashville, etc. R. Co. v. Hembree, 85 Ala. 481; 5 So. 173.

³ Card v. N. Y. & Harlem R. Co., 50 Barb. 39; Rockford, etc. R. Co. v. Irish, 72 Ill. 404; Illinois Central

R. Co. v. Middlesworth, 46 Id. 497; Toledo, etc. R. Co. v. Ingraham, 58 Id. 120.

⁴ Isbell v. New Haven R. Co., 27 Conn. 393; New Albany, etc. R. Co. v. McNamara, 11 Ind. 543; Omaha, etc. R. Co. v. Wright, 47 Neb. 886; 66 N. W. 842; Carlton v. Wilmington, etc. R. Co., 104 N. C. 365; 10 S. E. 516; Jones v. North Carolina R. Co., 70 N. C. 626; Northeastern R. Co. v. Martin, 78 Ga. 603; 3 S. E. 701; Alabama, etc. R. Co. v. Moody, 92 Ala. 279; 9 So. 238; Missouri Pac. R. Co. v. Gedney, 44 Kans. 329; 24 Pac. 464; Sheldon v. Chicago, etc. R. Co., S. Dak. ; 62 N. W. 955; Union Pac. R. Co. v. Patterson, 4 Colo. App. 575; 36 Pac. 913. In Michigan, trainmen are not bound to watch for a trespassing animal; but the jury may disregard their statement that they did not see it (Granby v. Michigan Cent. R. Co., 104 Mich. 403; 62 N. W. 579). See also Chicago, etc. R. Co. v. Barrie, 55 Ill. 226.

⁵ Fisher v. Farmers' Loan, etc. Co., 21 Wisc. 73; Toledo, etc. R. Co. v. Barlow, 71 Ill. 640; see Georgia, etc. R. Co. v. Neely, 56 Ga. 540; Lewis v. Freemont, etc. R. Co., 7 S. Dak. 183; 63 N. W. 781. Where a cow jumped upon the track at the opening of a cut about 200 yards in front of a train, incapable of being stopped under 400 yards, and as soon as the engineer discovered her, he blew the whistle, reversed the engine and applied brakes, the company was held not to be liable (Proctor v. Wilmington, etc. R. Co., 72 N. C. 579).

require engineers to anticipate the presence of trespassing cattle,⁶ unless experience has proved that they are often to be met with, at certain places.⁷ The rule in favor of passengers, which requires the use of the best appliances in the operation of trains, does not apply in favor of straying animals.⁸

§ 429. Checking or stopping train.—When cattle are not trespassers,¹ it is the duty of a railroad engineer, after becoming actually aware of their presence on the track, not only to sound an alarm, but also to check the speed of his train, and even to stop it,² if there is any reasonable ground for hope that he can thereby avoid injury to the cattle, without doing greater injury to the train. If cattle appear so suddenly and unexpectedly that the engineer cannot check the train in time to save them,³ or if the attempt to do so would, in his honest judgment, endanger the safety of the train,⁴ he is not in fault for not stopping it. The first duty of a railroad company is to its passengers; and if an engineer is compelled to choose between risking the safety of passengers, or even of freight upon his train, or his own life,⁵ and running over cattle

⁶ Illinois Cent. R. Co. v. Noble, 142 Ill. 578; 32 N. E. 684, overruling *dicta* in Illinois Cent. R. Co. v. Middleworth, 46 Ill. 495. This is the real meaning of the decisions in Harley v. Eutawville R. Co., 31 S. C. 151; 9 S. E. 782; Molair v. Port Royal R. Co., 29 S. C. 152; 7 S. E. 60.

¹ Trainmen are not required to be on the lookout for trespassing animals on track, other than at public crossings (Harrison v. Chicago, etc. R. Co., 6 S. Dak. 100; 60 N. W. 405).

⁸ Natchez, etc. R. Co. v. McNeil, 61 Miss. 434.

¹ This distinction is made in some courts, as will presently appear (§ 430, *post*). But almost every case here cited related to trespassing cattle.

² Aycock v. Wilmington, etc. R. Co., 6 Jones Law, 231; Illinois Central R. Co. v. Baker, 47 Ill. 295; Alabama, etc. R. Co. v. Powers, 73 Ala. 244; McMaster v. Montana R.

Co., 12 Mont. 163; 30 Pac. 268; Grimmell v. Chicago, etc. R. Co., 73 Iowa, 93; 34 N. W. 758; Toudy v. Norfolk, etc. R. Co., 38 W. Va. 694; 18 S. E. 896; Nashville, etc. R. Co. v. Hembree, 85 Ala. 481; 5 So. 173; Alabama, etc. R. Co. v. Moody, 90 Ala. 46; 8 So. 57; Jones v. Chicago, etc. R. Co., 77 Wisc. 585; 46 N. W. 884; Cleaveland v. Chicago, etc. R. Co., 35 Iowa, 220; Witherell v. Milwaukee, etc. R. Co., 24 Minn. 410; Hebron v. Chicago, etc. R. Co., 4 S. D. 538; 57 N. W. 494; Hyer v. Chamberlain, 46 Fed. 341; Davis v. Wabash R. Co., 46 Mo. App. 477.

³ Missouri, etc. R. Co. v. Palmer [Tex. Civ. App.], 27 S. W. 889.

⁴ Louisville, etc. R. Co. v. Ballard-2 Metc. [Ky.] 177; Bemis v. Connecticut, etc. R. Co. 42 Vt. 375; Alabama, etc. R. Co. v. McAlpine, 75 Ala. 113.

⁵ Yazoo, etc. R. Co. v. Brumfield, 64 Miss. 637; 1 So. 905.

on the track, he is justified in adopting the latter alternative. He may even, under circumstances which compel him to choose between upsetting the train and killing animals, increase his speed beyond the rate prescribed by statute, for the express purpose of killing them and thus saving his train.⁶ And if there is reasonable ground for an expectation that the cattle will take the alarm in time, and escape from the track before the train can reach them at its original speed, the engineer is not bound to reduce it.⁷ But, if he sees that the cattle continue to run along the track, instead of leaving it, he cannot excuse his omission to reduce speed on this ground.⁸ Not only will a probable injury to the particular train in charge of the engineer excuse him from checking its speed, for the protection of cattle, but the reasonable probability of a derangement in the running schedule of the railroad, such as might endanger other trains, is a valid excuse.⁹ Thus, on a road where trains run at intervals of only five or ten minutes, fatal disasters might be caused by stopping a train to save cattle. The true test, in all such cases, is what an honest, skillful, prudent engineer would do, under similar circumstances, if he saw his own cattle upon the track.¹⁰ The fact that many rail-

⁶ Chicago, etc. R. Co. v. Jones, 59 Miss. 465. In a Tennessee mule case, it was held error not to comply with a request to charge, which was substantially in the language of the text (Nashville, etc. R. Co. v. Troxlee, 1 Lea, 520). See also *Flattes v. Chicago, etc. R. Co.* (35 Iowa, 191), where this section is cited by the court as furnishing the rule to be followed.

⁷ Little Rock, etc. R. Co. v. Trotter, 37 Ark. 593. The court, in reversing judgment for plaintiff, said: "It cannot for a moment be supposed that a train should always be stopped or its speed slackened as soon as stock are discovered on the track. Ordinary prudence and caution require the engineer to promptly endeavor, by blowing the whistle, to drive them off, but do not require that the train should be stopped, or

its speed slackened, where he may reasonably believe that they will leave the track in time." *S. P., Hot Springs R. Co. v. Newman*, 36 Ark. 607 [speed reduced only].

⁸ Where horses were chased at full speed for 200 yards in a cut that was fenced, until, in their fright, they took to the track, the company was held liable (*Nashville, etc. R. Co. v. Anthoný*, 1 Lea, 516.)

⁹ Alabama, etc. R. Co. v. McAlpine, 75 Ala. 113.

¹⁰ An engineer is not bound to stop his train before stock gets upon the track, if he uses "all proper and reasonable effort to prevent" a collision (*Gordon v. Louisville, etc. R. Co.*, Ky. ; 29 S. W. 321). It is not required of the engineer, in running his train, to stop when stock are on the ground near his track; but he must keep a lookout for stock

roads in America are built in a manner which leaves them open to the entrance of animals has raised a question whether trains can properly be run on such roads at a rate of speed which will not admit of stoppage in time to avoid injuries to straying animals. In Alabama¹¹ it has been held that such speed is not allowable; in North Carolina,¹² Ohio,¹³ Nebraska¹⁴ and, we think, everywhere else, it is allowed. The question has ceased to be of general importance, because of the statutes concerning fences. These precautions having been fully observed, no recovery can be allowed for injuries to animals on the road on account of speed alone.¹⁵

on the track in daylight, and, when discovered, use all the means he can, consistent with the safety of the passengers, to avoid injuring or killing it (*Carlton v. Wilmington, etc. R. Co.*, 104 N. C. 365; 10 S. E. 516). The failure to check the speed of a train and blow the whistle, in approaching a crossing, will not render the company liable for killing a colt, when the colt was not on the track at the time, but subsequently attempted to cross the track at a point 300 yards from the crossing (*Georgia R. Co. v. Burke*, 93 Ga. 319; 20 S. E. 318). See *Bishop v. Chicago, etc. R. Co.*, 4 N. D. 536; 62 N. W. 605 [question for jury]; *Denver, etc. R. Co. v. Robinson*, 6 Colo. App. 432; 40 Pac. 840.

¹¹ See *Memphis, etc. R. Co. v. Lyon*, 62 Ala. 71; *Alabama, etc. R. Co. v. Jones*, 71 Id. 487; *Nashville, etc. R. Co. v. Hembree*, 85 Id. 481; 5 So. 173; *Central R. Co. v. Ingram*, 98 Ala. 395; 12 So. 801; *Louisville, etc. R. Co. v. Cochran*, 105 Ala. 354; 16 So. 797.

¹² To charge the jury that the company should provide such appliances as would enable the engineer to stop the train within the distance at which a cow could be seen by means of the head-light, and, if not furnished, then it was the defendants'

duty to so slacken the speed that the train could be stopped within that distance,—held error (*Winston v. Raleigh, etc. R. Co.*, 90 N. C. 66).

¹³ *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66.

¹⁴ *Chicago, etc. R. Co. v. Clark*, 26 Neb. 645; 42 N. W. 703.

¹⁵ *Gay v. Wadley*, 86 Ga. 103; 12 S. E. 298; *Western, etc. R. Co. v. Trimmier*, 84 Ga. 112; 10 S. E. 503; *Moye v. Wrightsville, etc. R. Co.*, 83 Ga. 669; 10 S. E. 441; *Crawley v. Georgia R. Co.*, 82 Ga. 190; 8 S. E. 417. Where such precautions have been taken in vain, and the animal refused even to be driven off by a man upon the road, the company was exonerated (*Montgomery v. Wilmington, etc. R. Co.*, 6 Jones Law, 464). When the night was dark and foggy, the engineer did not see the cattle till within fifteen feet of the locomotive, and although it was impossible to prevent the injury, everything possible was attempted to avoid it, a judgment for plaintiff was reversed (*New Orleans, etc. R. Co. v. Burkett* [Miss.], 2 So. 253; *Grundy v. Louisville, etc. R. Co.* [Ky.], 2 S. W. 899). "The stoppage of trains upon every vague apprehension of danger should not be required without some reason" (*Chicago, etc. R. Co. v. Bradfield*, 63 Ill.

§ 430. **Checking speed for trespassing cattle.**— Even when cattle are trespassing upon the track, our own opinion is that the same rules should be applied to every case in which an engineer is actually aware of the presence of cattle upon the track, as have been stated with regard to other cattle. The rule in *Davies v. Mann*, which, as already shown,¹ has been almost universally adopted, clearly involves this conclusion. The weight of authority, in the western and southern courts, is in accordance with this view, holding that an engineer, in such cases, must slacken speed, and even stop his train,² in the absence of any special reason for not doing so, if necessary to avoid serious injury to valuable animals. The weight of authority in the eastern states seems to be in favor of holding that the engineer of a train, even after he is perfectly aware that cattle are straying upon the track unlawfully, is not bound to do anything more than to sound an alarm, and need not slacken speed, though it may be entirely within his power to do so, and though it may be evident that the cattle will be killed if he does not.³ If these decisions had been put upon

220). Where the engineer, after he sees stock upon the track, does everything that is possible to avoid collision, the company is not liable, though the engineer might have seen the cattle near the track in time to have stopped his train before they came upon it (*New Orleans, etc., R. Co. v. Bourgeois*, 66 Miss. 3; 5 So. 629).

¹ See § 99, *ante*.

² If trespassing animals are seen on the track in time to stop the train and save them, it is negligence not to do so (*Cincinnati, etc. R. Co. v. Smith*, 22 Ohio St. 227). To the same effect, *Grimmell v. Chicago, etc. R. Co.*, 73 Iowa, 93; 34 N. W. 758; *Lafayette, etc. R. Co. v. Shriner*, 6 Ind. 141; *New Albany, etc. R. Co. v. McNamara*, 11 Ind. 543; *Jackson v. Rutland, etc. R. Co.*, 25 Vt. 150; *Trow v. Vermont Central R. Co.*, 24 Id. 487; *Pritchard v. La Crosse, etc. R. Co.*, 7 Wisc. 232;

Isbell v. New Haven R. Co., 27 Conn. 393; *Williams v. Michigan Central R. Co.*, 2 Mich. 259; *Bowman v. Troy, etc. R. Co.*, 37 Barb. 516, 520; *Atlantic, etc. R. Co. v. Burt*, 49 Ga. 606; *Clark v. Western, etc. R. Co.*, 1 Winston [N. C.] Law, 109; *Trout v. Virginia, etc. R. Co.*, 23 Gratt. 619; *Alabama, etc. R. Co. v. McAlpine*, 75 Ala. 113; *Chicago, etc. R. Co. v. Barrie*, 55 Ill. 226; *Toledo, etc. R. Co. v. Barlow*, 71 Id. 640; *Missouri, etc. R. Co. v. Wilson*, 28 Kans. 637; *Atchison, etc. R. Co. v. Davis*, 31 Kans. 645; 3 Pac. 301; *Warren v. Chicago, etc. R. Co.*, 59 Mo. App. 367. See *Layne v. Ohio Riv. R. Co.*, 35 W. Va. 438; 14 S. E. 123.

³ *Boyle v. N. Y., Lake Erie, etc. R. Co.*, 39 Hun, 171; *aff'd*, 115 N. Y. 636; 21 N. E. 724; *Darling v. Boston, etc. R. Co.*, 121 Mass. 118; *Maynard v. Boston, etc. R. Co.*, 115 Id. 458; *Price v. N. Jersey R. Co.*

the ground, in the particular cases, that the safety of passengers, or even the general safety of the business, required that the train should go on, without stopping, or that the engineer did not see the cattle in time to stop and avoid striking them, we should entertain no doubt of their soundness. But without this qualification, we cannot assent to them. We think that an engineer, in such a case, unless restrained by superior considerations of safety, ought to check the speed of his train. Humanity and compassion are entitled to some recognition in the rules of justice, as well as mere money values. And, moreover, these cases cannot be sustained without holding that land-owners owe no care whatever to trespassers, for the purpose of avoiding injury to them, even when they are in full view. We have already expressed our opinion to the contrary of this;⁴ and we adopt as our own, with regard to the duty of a locomotive engineer, who is aware of the presence of cattle on the track, even though unlawfully there, the admirable remarks of the Supreme Court of Alabama: "Persons having the control of railroad trains in motion, must bestow that degree of care and diligence which very careful and prudent persons employ in their own private affairs of similar nature. To illustrate this principle, let it be supposed the engineer is the owner of the railroad, with all its interests and responsibilities, and the stock imperiled is his own. He is running on schedule time, must avoid collisions with other trains, must strive to make connections and so maintain the accustomed speed of his train, that the reputation of his road for the transportation of passengers and freight be preserved. He is supposed also to entertain a due regard for the safety of his cattle. *He will not be expected to stop his train upon every occasion of possible danger to his stock. If he did so, he would derange the schedule and miss his connections.* Neither will he be expected to run with unchecked speed throughout the whole line. He has at his command appliances for checking the speed of his train, for stopping it altogether, and frightening stock from the track. He is acquainted with the habits of cattle, and with the effect of the stock-alarm upon them. If

31 N. J. L. 229 ; Indianapolis, etc. R. Co. v. Caudle, 60 Ind. 112 ; Mc-
Candless v. Chicago, etc. R. Co., 45 Wisc. 365.

⁴See §§ 97, 98, *ante*.

the cattle be upon the track he will sound the alarm, and at the same time check the speed of the train, so that if the alarm prove ineffectual, he can halt his train and thus save his stock. He would probably pursue this course if the cattle were perceived a sufficient distance ahead to give time for these several stages. If, however [and these were the facts of the case], with a sufficient head-light, with good brakes in good working order, and without any negligence or inattention on the part of the engineer, the cattle not being seen, or seeable before, spring suddenly on the track, or became visible on the track in so close proximity to the engine that any attempt to stop the engine in time, or otherwise to prevent the collision, must fail, then there is no want of care, even if no attempt be made to stop the engine.”⁵

§ 431. **Statutory rules as to checking speed.**—In Tennessee,¹ Alabama² and Georgia,³ and perhaps in other states, these matters are regulated by statutes, which imperatively require the whistle to be sounded and the speed of trains to be checked, in every case in which animals or other obstructions are discerned upon the track. In Tennessee, the statute is construed as peremptory; and no probability that sounding

⁵ Alabama, etc. R. Co. v. McAlpine, 75 Ala. 113. See also East Tenn. etc. R. Co. v. Bayliss (75 Ala. 466), where the engineer's lookout for cattle was deemed as diligent as was compatible with his other duties, and with his efforts to catch up with schedule time.

¹ “When any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train” (Tenn. Code, 1884, par. 1298, cl. 4).

² The Alabama Code requires brakes to be applied and engines reversed when any obstruction is perceived on the track, and this provision is held to be applicable to cattle and horses (Ala. Code, §§ 1699, 1700; now Code 1886, pars. 1144,

1147; see South, etc. Ala. R. Co. v. Williams, 65 Ala. 74). If these statutory precautions are neglected by the engineer, when he sees cattle in close proximity to the track under circumstances indicating danger of their getting on the track, the company is liable, though they enter suddenly upon the track so close to the train that it is impossible not to strike them (South, etc. Ala. R. Co. v. Jones, 56 Ala. 507). This statute requires trainmen to keep a lookout for cattle (Mobile, etc. R. Co. v. Kimbrough, 96 Ala. 127; 11 So. 307; Louisville, etc. R. Co. v. Posey, 96 Ala. 262; 11 S. O. 423; Central R. Co. v. Lee, 96 Ala. 444; 11 So. 424; Louisville, etc. R. Co. v. Rice, 101 Ala. 676; 14 So. 639).

³ Georgia Code, §§ 708, 3033.

the whistle or checking speed would be unavailing is allowed as an excuse.⁴ But, if the injury complained of would certainly not have been avoided, even if the statute had been strictly complied with, a partial failure in such compliance will not suffice to make the railroad company liable. It was thus held in a case where the train was in fact stopped before the injury actually occurred, although not before the animal had been so frightened that it killed itself.⁵ In Alabama and Georgia, the statutes are construed as only raising a presumption of negligence, where an engineer fails to slacken speed in sight of cattle; and it is held that he is justified in purposely omitting to do so, if necessary to avoid a danger to trains, greater than the injury to animals in sight.⁶ The speed of trains at crossings within depot grounds, or within the corporate limits of cities or villages, is frequently restricted by statutes or municipal ordinances. Where animals are struck by a train running at a prohibited rate of speed, the violation of the statute or ordinance is competent evidence of negligence;⁷ and in such a case a presumption of negligence arises.⁸

⁴ Nashville, etc. R. Co. v. Thomas, 5 Heisk. 262 [whistle not sounded].

⁵ Where a mule jumped on the track in front of a train, and ran on it for 200 yards, and then on a trestle from which it leaped and was killed, it was not error to charge the jury: "If you find that the defendant's train was stopped before it overtook the mule, and that the mule was frightened at the time and ran along the track and jumped off and killed itself, the defendant would not be liable, even if all the statutory precautions were not complied with by defendant" (Holder v. Chicago, etc. R. Co., 11 Lea, 176). Here, it will be seen, the animal's death was due to fright, which would have been increased by whistling. The distinction between this case and Nashville, etc. R. Co. v. Thomas (5 Heisk. 262), is that in the latter case, the train actually struck and killed the

animal. See, also, East Tenn. etc. R. Co. v. Scales, 2 Lea, 688. The statute does not apply where the animal, when seen, is not on the track, but merely within the company's right of way, though in such a case the jury may find it to be negligence not to sound the alarm (Louisville, etc. R. Co. v. Reidmond, 11 Lea, 205).

⁶ Alabama, etc. R. Co. v. McAlpine, 75 Ala. 113; Western, etc. R. Co. v. Steadly, 65 Ga. 263; Georgia R. Co. v. Fisk, Id. 714; Atlantic, etc. R. Co. v. Griffin, 61 Id. 11.

⁷ Moore v. Chicago, etc. R. Co. 93 Iowa, 484; 61 N. W. 992; Cleveland, etc. R. Co. v. Ahrens, 42 Ill. App. 434.

⁸ Union Pac. R. Co. v. Rassmussen, 25 Neb. 810; 41 N. W. 778; Ohio, etc. R. Co. v. O'Donnell, 26 Ill. App. 348; Newman v. Vicksburg, etc. R. Co., 64 Miss. 115; 8 So. 172; Cleve-

§ 432. **Presumption as to negligence.**—In some states, such as Alabama,¹ Florida,² Georgia,³ North Carolina,⁴ Kentucky,⁵ Arkansas,⁶ Mississippi,⁷ Texas,⁸ the two Dakotas,⁹ Iowa,¹⁰

land, etc. R. Co. v. Ahrens, 42 Ill. App. 434.

¹ Mobile, etc. R. Co. v. Caldwell, 83 Ala. 196; 3 So. 445; Louisville, etc. R. Co. v. Kelsey, 89 Ala. 287; 7 So. 648. See Birmingham Mineral R. Co. v. Harris, 98 Ala. 326; 13 So. 377.

² See Jacksonville, etc. R. Co. v. Wellman, 26 Fla. 344; 7 So. 845; Jacksonville, etc. R. Co. v. Garrison, 30 Fla. 567; 11 So. 926.

³ The presumption of negligence arising from the killing of animals on a railroad is overcome by two witnesses who saw the accident and testified positively (Savannah, etc. R. Co. v. McConnell, 94 Ga. 352; 21 S. E. 568.) For other cases of successful rebuttal, see Georgia, etc. R. Co. v. Harris, 83 Ga. 393; 9 S. E. 786; Georgia Co. v. Parks, 91 Ga. 71; 16 S. E. 266; Georgia R. Co. v. Middlebrooks, 91 Ga. 76; 16 S. E. 989; Alabama, etc. R. Co. v. Blivens, 92 Ga. 522; 17 S. E. 836.

⁴ N. C. Code, 1883, § 2326. See Wilson v. Norfolk, etc. R. Co., 90 N. C. 69; Doggett v. Richmond, etc. R. Co., 81 N. C. 459. The burden of repelling the presumption is thrown upon the company (Pippen v. Wilmington, etc. R. Co., 75 N. C. 54). Applied to a new case Randall v. Richmond, etc. R. Co., 107 N. C. 748; 12 S. E. 605.

⁵ Ky. Gen. Stat. ch. 57, § 5; Kentucky, etc. R. Co. v. Talbot, 78 Ky. 621. Hence the burden is on the company to show that the killing was so nearly unavoidable that the employees in charge of the train could not have prevented it by the exercise of ordinary care and diligence (Grundy v. Louisville, etc. R.

Co. [Ky.], 2 S. W. 899). See Kentucky R. Co. v. Conner, Ky. ; 31 S. W. 467.

⁶ Ark. Stat., Feb. 3, 1875; now, Sandels & Hill Dig. Stat. 1894, § 6356; St. Louis, etc. R. Co. v. Hagan, 42 Ark. 122; Little Rock, etc. R. Co. v. Henson, 39 Id. 413; Little Rock, etc. R. Co. v. Payne, 33 Id. 816; Memphis, etc. Co. v. Jones, 36 Id. 87; St. Louis, etc. R. Co. v. Vincent, 36 Id. 451. These cases clearly throw the burden of proving reasonable care upon the company. In the Henson case, *supra*, the company rebutted the presumption, and so in Little Rock, etc. R. Co. v. Turner, 41 Ark. 161; Little Rock, etc. R. Co. v. Holland, 41 Id. 336; St. Louis, etc. R. Co. v. Basham, 47 Id. 321; 1 S. W. 555. The statute of Arkansas was not put in force in the Indian Territory by Act Cong. May 2, 1890, § 31 (26 St. p. 81). See Eddy v. Lafayette, 49 Fed. 798; 4 U. S. App. 243; 1 C. C. A. 432.

⁷ Code Miss. § 1059, places the burden on the railroad company to show a want of negligence in such cases (Louisville, etc. R. Co. v. Smith, 67 Miss. 15; 7 So. 212).

⁸ Rev. Stat., 1895, art. 4527. When road has been fenced, company only liable for "want of ordinary care" (Ib., art. 4528).

⁹ Code Civ. Proc. § 679; Volkman v. Chicago, etc. R. Co., 5 Dak. 69; 37 N. W. 731; Huber v. Chicago, etc. R. Co., 6 Dak. 392; 43 N. W. 819; Bates v. Fremont, etc. R. Co., 4 S. D. 394; 57 N. W. 72.

¹⁰ Code, § 1289; Wall v. Des Moines, etc. R. Co., 89 Iowa, 193; 56 N. W. 436.

and Washington,¹¹ statutes have been enacted, directing that the mere fact of an injury being caused to animals by the trains of a railroad company shall establish a presumption of negligence against the company, which can only be removed by affirmative evidence that it used ordinary care. This presumption applies in favor of cattle straying upon the track, where they ought not to be, as well as to others. Except in South Carolina,¹² no such presumption exists, at common law, in favor of cattle straying upon the premises of a railroad company, even in those states which recognize the right of cattle to be at large;¹³ and, of course, not in those states which adhere to the old English rule. But in all the states it is probably the rule that evidence that cattle were injured by a train, while they were rightfully upon the track, as, for example, while diligently crossing at a level highway crossing, raises such a presumption.¹⁴

§ 433. When an animal is rightfully on track.—An animal is rightfully upon the track of a railroad, not only when it is there with the permission of the company,¹ but also when

¹¹ Laws 1893, p. 418; *Jolliffe v. Brown*, 14 Wash. St. 155; 44 Pac. 149.

¹² *Danner v. South Carolina R. Co.*, 4 Rich. Law, 329; *Murray v. South Carolina R. Co.*, 10 Id. 227; *North Eastern Co. v. Sineath*, 8 Id. 185; *Joyner v. South Carolina R. Co.*, 26 S. C. 49; 1 S. E. 52. And see *Balcom v. Dubuque, etc. R. Co.*, 21 Iowa, 102; *Whitbeck v. Dubuque, etc. R. Co.*, Id. 103. This rule does not extend to the case of a dog (*Wilson v. Wilmington, etc. R. Co.*, 10 Rich. Law, 52). The South Carolina statute requiring stock to be kept inclosed has not changed the rule laid down in the text and in the *Danner* case (*Jones v. Columbia, etc. R. Co.*, 20 S. C. 249; *Simkins v. Columbia, etc. Co.*, 20 Id. 258). When plaintiff proves the fact of the killing, and the value of the stock, there is a *prima facie* case against defendant, and it is proper

to refuse to grant a nonsuit (*Walker v. Columbia, etc. R. Co.*, 25 S. C. 141).

¹³ In the absence of a statutory rule to that effect, the law does not presume negligence from the fact alone that stock was injured or killed by a railroad company (*Eddy v. Lafayette*, 49 Fed. 798; 4 U. S. App. 243; 1 C. C. A. 432; *Same v. Dulaney*, 49 Fed. 800; 4 U. S. App. 246; 1 C. C. A. 435; *Cleveland, etc. R. Co. v. Elliot*, 4 Ohio St. 474; *Wines v. Rio Grande R. Co.*, 9 Utah, 228; 33 Pac. 1042; *Perse v. Atchison, etc. R. Co.*, 51 Mo. App. 171). It was so in North Carolina, before the statute previously cited was passed (*Scott v. Wilmington, etc. R. Co.*, 4 Jones Law, 432; *Jones v. North Carolina R. Co.*, 67 N. C. 122).

¹⁴ *White v. Concord R. Co.* 30 N. H. 188.

¹ *St. Louis, etc. R. Co. v. Taylor*, 57 Ark. 136; 20 S. W. 1083.

it is under the care of a suitable person driving it, by a lawful road, crossing the railroad at a level, with ordinary care, and this, whether the animal in obedience to its keeper, is crossing the track at a proper place,² or is proceeding along the track, where necessary, or has broken away from the control of its keeper, and is upon any part of the railroad, however improperly, so long as the keeper diligently continues in pursuit and endeavors to reclaim it.³ Of course, when the track is laid upon a public highway, especially if laid lengthwise, and not merely across it, an animal traveling under proper supervision, or permitted by a valid local ordinance to run at large on the highway, is lawfully there; the company is bound to anticipate that animals will probably be there, and to use ordinary care in view of that probability.⁴ In any of these cases, it would be error to instruct a jury that the railroad company was liable only for gross negligence.⁵ Certain classes of animals may also be considered as lawfully upon the track (where the English rule does not govern), when the company has negligently left on the track, at a place where it is open, salt,⁶ molasses,⁷ or similar things, which are well known to have an almost irresistible attraction for such animals.

² *White v. Concord R. Co.*, 30 N. H. 188; *Lane v. Kansas City, etc. R. Co.*, 31 Kans. 525; see *Bowman v. Troy, etc. R. Co.*, 37 Barb. 516, 517; *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 259.

³ See last two cases.

⁴ A city ordinance provided that cows might run at large during the day, from April 1 to December 1. Held, that a company was bound to run its train through the city with reference to such ordinance, and that the jury could find any excess over the lawful rate of speed to be negligence (*Fritz v. St. Paul, etc. R. Co.*, 22 Minn. 404). In *Munger v. Tonawanda R. Co.* (5 Denio, 255; 4 N. Y. 349), a similar ordinance was held beyond the power of the council and therefore void. As to the duty of care in respect to the condi-

tion of the track under such circumstances, see § 408, *ante*.

⁵ *Lane v. Kansas City, etc. R. Co.*, 31 Kans. 525; 3 Pac. 341.

⁶ *Crafton v. Hannibal, etc. R. Co.*, 55 Mo. 580 [cattle]; *Morrow v. Hannibal, etc. R. Co.*, 29 Mo. App. 432 [brine]; *Burger v. St. Louis, etc. R. Co.*, 52 Mo. App. 119 [salt]. But not so where defendant used salt as a solvent to free its tracks of snow and ice, such use *not* being negligence (*Louisville, etc. R. Co. v. Phillips [Miss.]*, 12 So. 825; *Kirk v. Norfolk, etc. R. Co.*, 41 W. Va. 722; 24 S. E. 639). Nor where salt was stored by the company's agent on his own account (*Whitesides v. St. Louis, etc. R. Co.*, 58 Mo. App. 655).

⁷ *Page v. North Carolina R. Co.*, 71 N. C. 222 [hogs]. This is not the law of New York (*Bush v. Brainard*,

§ 434. Where fences are not required.—In several western states the courts hold that a railroad company is not bound to fence around its depots, machine-shops, car-houses,¹ etc., nor

1 Cow. 78); because the English rule as to cattle governs there.

¹ So held in *Indiana*: *Wabash, etc. R. Co. v. Nice*, 99 Ind. 152; *Indianapolis, etc. R. Co. v. Oestel*, 20 Id. 231; *Indiana, etc. R. Co. v. Sawyer*, 109 Id. 342; *Bechdolt v. Grand Rapids, etc. R. Co.*, 113 Ind. 343; 15 N. E. 636.

Michigan: *Flint, etc. R. Co. v. Lull*, 28 Mich. 510; *Chicago, etc. R. Co. v. Campbell*, 47 Id. 265; 11 N. W. 152; *McGrath v. Detroit, etc. R. Co.*, 57 Mich. 555; 24 N. W. 854. As much of the track and grounds outside of the switches as is necessary for reaching the side tracks, upon which are located coal sheds, is a part of the depot grounds, to which the statutory requirement to fence does not apply (*Grondin v. Duluth, etc. R. Co.*, 100 Mich. 598; 59 N. W. 229).

Iowa: *Davis v. Burlington, etc. R. Co.*, 26 Iowa, 549; *Latty v. Burlington, etc. R. Co.*, 38 Id. 250; *Kyser v. Kansas, etc. R. Co.*, 56 Id. 207; 9 N. W. 338.

Oregon: *Moses v. Southern Pac. R. Co.*, 18 Ore. 385; 23 Pac. 498.

Illinois: The Illinois statute does not apply to stations or depot grounds, although these may not be in towns or villages. Side tracks, however, not at stations, come within the statute (*Chicago, etc. R. Co. v. Hans*, 111 Ill. 114). It is no excuse for not fencing a road at a point outside of any municipality that the road can be more safely and conveniently used if unfenced at that point (*Toledo, etc. R. Co. v. Franklin*, 159 Ill. 99; 42 N. E. 319).

In *Wisconsin*, depot grounds are excepted by the statute. See

Plunkett v. Minneapolis, etc. R. Co., 79 Wisc. 222; 48 N. W. 519; *McDonough v. Milwaukee, etc. R. Co.*, 73 Wisc. 223; 40 N. W. 806 [question of extent of depot-grounds left to the jury]. Whether half a mile along the track which was not fenced was reasonably necessary for depot-grounds, is a question of fact (*Grosse v. Chicago, etc. R. Co.*, 91 Wisc. 482; 65 N. W. 185).

Minnesota: The implied exception to the statute requiring railroad companies to fence their tracks, which allows places to be left open to afford necessary and suitable access to station and depot grounds, simply modifies the general obligation to fence, so far as the necessity upon which the exception rests requires (*Kobe v. Northern Pac. R. Co.*, 36 Minn. 518; 32 N. W. 783; see *Cox v. Minneapolis, etc. R. Co.*, 41 Minn. 101; 42 N. W. 924).

In *Missouri*: No fence is required at a station, if it was necessary, for convenience in reception and discharge of freight and passengers, that such space should be left open (*Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Swearingen v. Missouri, etc. R. Co.*, 64 Mo. 73; *Crenshaw v. St. Louis, etc. R. Co.*, 54 Mo. App. 233). The mere existence of a switch at a certain point does not make that point a part of the grounds used for switch and depot purposes, which, under the statute, need not be fenced. All grounds must be fenced but those necessary to the use of the public and the transaction of business (*Vanderwerker v. Missouri Pac. R. Co.*, 51 Mo. App. 166).

In *Tennessee*: Though Act 1891, ch. 101, does not require a railroad

so as to prevent the convenient access of its customers;² nor in general, where fences would endanger the safety of employees³ or seriously interfere with the performance of its duties to the public.⁴ No such exceptions are allowed in New

to fence its tracks at a depot, it is liable for the death of a mare that strayed on the track at such a place in the absence of cattle-guards (Nashville, etc. R. Co. v. Hughes, 94 Tenn. 450; 29 S. W. 723).

Kansas: "So much of the grounds and side-tracks connected with the depot as is reasonably necessary for the business of the public should be free of access and unobstructed by fences or cattle guards." But this must be limited "to public necessity or convenience" (Prickett v. Atchison, etc. R. Co., 33 Kans. 748; 7 Pac. 611).

Texas: No fences required within switch limits, where it would be inconvenient both to the public and to defendants to fence the track (Swanson v. Melton [Tex App.], 17 S. W. 1088); or at stations (Gulf, etc. R. Co. v. Ogg, 8 Tex. Civ. App. 285; 28 S. W. 347).

² Indianapolis, etc. R. Co. v. Kinney, 8 Ind. 402. The company is not required, in Indiana, to fence opposite and adjoining to its depot grounds, where the space needs to be open for the passage and the traffic of the company and the public (Indianapolis, etc. R. Co. v. Crandall, 58 Id. 365; Indiana, etc. R. Co. v. Quick, 109 Id. 295); nor is it required to fence between its track and a saw-mill fifty feet distant, the open space being needed for transportation (Pittsburgh, etc. R. Co. v. Bowyer, 45 Id. 496). Whether a railroad company is obliged to fence its road at a given point is usually a question of law (Stewart v. Pennsylvania Co., 2 Ind. App. 142; 28 N. E. 211; Jefferson-

ville, etc. R. Co. v. Peters, 1 Ind. App. 69; 27 N. E. 299). But where the evidence is conflicting as to whether or not the tracks could have been fenced at the point where the stock was killed, it is a matter for the jury to determine (Terre Haute, etc. R. Co. v. Schaeffer, 5 Ind. App. 86; 31 N. E. 557). So held also in Toledo, etc. R. Co. v. Cupp, 9 Ind. App. 244; 36 N. E. 445. The Iowa rule that a company need not fence its station grounds, was held not to apply to a switch which was not on the station grounds, and 500 feet from the station (Comstock v. Des Moines R. Co., 32 Iowa, 376); nor is a switch within the rule in Missouri (Morris v. St. Louis, etc. R. Co., 53 Mo. 78); nor in Texas (Houston, etc. R. Co. v. Simpson, 2 Tex. App. Cas. § 670); but it has been held to be, under special circumstances, in Indiana (Evansville, etc. R. Co. v. Willis, 93 Ind. 507); and so has a spur track (Lake Erie, etc. R. Co. v. Kneadle, 94 Id. 454).

³ Lake Erie, etc. R. Co. v. Kneadle, 94 Ind. 454; Evansville, etc. R. Co. v. Willis, 93 Id. 507; Jennings v. St. Joseph, etc. R. Co. 37 Mo. App. 651). Burden of proof on this point is on defendant (Cox v. Atchison, etc. R. Co., 128 Mo. 362; 31 S. W. 3).

⁴ Mere inconvenience to the company is not a sufficient excuse (Houston, etc. R. Co. v. Simpson, 2 Tex. App. Cas. § 670). See this question discussed at length in Fort Wayne, etc. R. Co. v. Herbold (99 Ind. 91), where the company placed a cattle-guard sixty feet from a highway, and was held liable because it failed to show that to have placed it nearer

York; the courts holding that they are not at liberty to fritter away the express requirements of the statute in this manner.⁵ The only exception allowed in New York is at points where no fence is needed to keep out cattle, sheep or hogs.⁶ Of course no fence ought to be built across a highway;⁷ and although a highway has been practically abandoned for two years, yet, if it has not been legally surrendered by the proper authorities a railroad company is not bound to put a fence across it.⁸ But, under a statute requiring railroads to be "securely fenced," they must be fenced where they run beside highways⁹ and canals;¹⁰ and gates must be kept at private crossings.¹¹ A railroad company is not required, by a statute requiring it to fence against adjoining owners, to fence one part of its own land from another part thereof, even for the benefit of a person who is licensed by it, for a valuable consideration, to use either part of its land.¹² In Iowa, there being no statutory require-

to the crossing would have interfered with the performance of the company's duty to the public. The fact that a company owns land, and is using it as a place to deposit wood, does not exempt it from its duty to fence (*Bellefontaine R. Co. v. Reed*, 33 Ind. 476).

⁵ *Bradley v. Buffalo, etc. R. Co.*, 34 N. Y. 427. The fact that a railroad crossing is at or near a depot, and that to construct a cattle-guard there would cause inconvenience, will not excuse from complying with the positive requirement of the statute (*Tracy v. Troy, etc. R. Co.*, 38 N. Y. 433; *Lackin v. Delaware, etc. Canal Co.*, 22 Hun, 309). The liability for damages remains, even where the court would not require specific performance of the requirement to fence (*Kelver v. N. Y. Central R. Co.*, 126 N. Y. 365; 27 N. E. 553).

⁶ *Kelver v. N. Y. Central R. Co.*, *supra*.

⁷ This exception in the statute is to be implied even where not expressed (*Lafayette, etc. R. Co. v.*

Shriner, 6 Ind. 141; *Jeffersonville, etc. R. Co. v. Huber*, 42 Id. 173; *Louisville, etc. R. Co. v. Hurst*, 98 Id. 330; *Soward v. Chicago, etc. R. Co.*, 30 Iowa, 551).

⁸ *Indiana Central R. Co. v. Gapen*, 10 Ind. 292.

⁹ *Indianapolis, etc. R. Co. v. Guard*, 24 Ind. 222; *Andre v. Chicago, etc. R. Co.*, 30 Iowa, 107. And this is the general rule along highways (*Maher v. Winona, etc. R. Co.*, 31 Minn. 401; *Missouri Pac. R. Co. v. Eckel*, 49 Kans. 794; 31 Pac. 693; *Emmerson v. St. Louis, etc. R. Co.*, 35 Mo. App. 621).

¹⁰ *White Water, etc. R. Co. v. Quick* (30 Ind. 384), in which it was held that the company must fence against the tow-paths of an abandoned canal. See s. c., 31 Ind. 127.

¹¹ *Pittsburgh, etc. R. Co. v. Cunningham*, 39 Ohio St. 327; *Indianapolis, etc. R. Co. v. Thomas*, 84 Ind. 194; *Baltimore, etc. R. Co. v. Kreiger*, 90 Id. 380. See § 417a, *ante*.

¹² *Marfell v. South Wales R. Co.*, 8 C. B. N. S. 525; *Roberts v. Great Western R. Co.*, 4 Id. 506.

ment of cattle-guards at private crossings, a railroad company is not bound to put them there;¹³ and a provision requiring cattle-guards at "road-crossings" does not extend to farm-crossings or other private ways.¹⁴ A railroad company is not necessarily excused from fencing on an embankment;¹⁵ nor on a bluff, or as near thereto as is practicable;¹⁶ and even where, as in Wisconsin, it is expressly declared by statute that no fence is required where an "*embankment*," or "*other sufficient protection*," renders a fence unnecessary, the company must take the risk of such embankment not proving to be a sufficient protection.¹⁷ In Maine, the statute clearly does not require railroads to be fenced where they run through uninclosed and unimproved lands.¹⁸ The fact that an adjoining landowner has put up a fence does not relieve the company from its statutory duty. It must bear all risks of that fence.¹⁹

¹³ *Bartlett v. Dubuque, etc. R. Co.*, 20 Iowa, 188. But see note 11, § 455, *post*. A railroad company omitted to fence the line of its road in front of a culvert under the road-bed, and did not construct any barrier to prevent cattle from entering the culvert. The water was usually deep enough to prevent the passage of cattle, but on a day when the water was low, a cow passed through the culvert, over land on the other side of it, and then entered the railroad at a place which was defectively fenced. Held, that the company was liable (*Keliher v. Connecticut, etc. R. Co.*, 107 Mass. 411).

¹⁴ *Bartlett v. Dubuque, etc. R. Co.*, 20 Iowa, 188; and see *Brooks v. N. Y. & Erie R. Co.*, 13 Barb. 594.

¹⁵ *Toledo, etc. R. Co. v. Sweeney*, 41 Ill. 226.

¹⁶ Where there was no fence at all, though a fence was practicable, except at a place where there was a rocky bluff, finding for plaintiff was upheld (*Louisville, etc. R. Co. v. Zink*, 85 Ind. 219).

¹⁷ Under the Wisconsin statute, which requires no fence where the

proximity of ponds, hills, embankments, etc., renders a fence unnecessary, the fact that cattle have, in a given instance, surmounted an embankment and got upon the track, is conclusive that such embankment was not a sufficient protection (*Veerhusen v. Chicago, etc. R. Co.*, 53 Wisc. 689). Compare *Hillard v. Chicago, etc. R. Co.*, 37 Iowa, 442; *Shellabarger v. Chicago, etc. R. Co.*, 66 Id. 18.

¹⁸ The Maine statute (R. S. 1883, ch. 51, § 36) only requires fences where the railroad passes through inclosed or improved land or wood-lots belonging to a farm. See *Perkins v. Eastern R. Co.*, 29 Me. 307. Compare, under Indiana statute, *Louisville, etc. R. Co. v. Hart*, 2 Ind. App. 130; 28 N. E. 218; *Jeffersonville, etc. R. Co. v. Dunlap*, 112 Ind. 93; 13 N. E. 403.

¹⁹ *Norfolk, etc. R. Co. v. McGavock*, 90 Va. 507; 18 S. E. 909; *San Antonio, etc. R. Co. v. Peterson*, 8 Tex. Civ. App. 367; 27 S. W. 969. A statutory requirement to maintain fences "on each side of such roads," means the margin or border of the

But it is not obliged to build another fence, so long as that stands and is sufficient.²⁰

§ 435. Fences and cattle-guards in towns.—Under the general language of the New York fence law, and most of the other statutes already cited, there is no general exception, either expressed or implied, by which railroads are excused from being fenced in villages, towns, “or even cities.”¹ In many places such obstructions would be intolerable nuisances; and at such points an exception will be implied. Thus fences cannot, merely under the authority of these statutes, be placed across a city street, nor cattle-guards at the corners of a street in actual use for constant travel.² But, if no public inconvenience will ensue, fences must be maintained, in accordance with the statute, even within the corporate limits of a city. And cattle-guards must be maintained at the crossings of village streets, where they can be placed upon land belonging to the company,³ though not where a railroad running along a street is crossed by another street, and the passage of either street would be necessarily impeded by cattle-guards.⁴ A city ordinance, prohibiting animals from running at large within the

entire right of way (*Gould v. Great Northern R. Co.*, 63 Minn. 37; 65 N. W. 125).

²⁰ Where an adjacent owner constructs a sufficient fence, inclosing his own land in such a manner that it may inclose the railroad also, the mere fact that no compensation was paid for the right of way through such land does not prevent the company from joining its fence to his; and if the railroad is properly enclosed by such joining of fences, no additional fence need there be built by the company (*Haxton v. Pittsburgh, etc. R. Co.*, 26 Ohio St. 214).

¹ *Tracy v. Troy, etc. R. Co.*, 38 N. Y., 433; *Brace v. N. Y. Central R. Co.*, 27 Id. 269; overruling *Bowman v. Troy, etc. R. Co.*, 37 Barb. 516; and *Parker v. Rensselaer, etc. R. Co.*, 16 Barb. 315. See *Crawford v. N. Y. Central R. Co.*, 18 Hun, 108. In

Ohio, the statute requires the maintenance of fences in cities and villages where they will not obstruct streets, highways, or other public grounds (*Cleveland, etc. R. Co. v. McConnell*, 26 Ohio St. 57).

² *Illinois Central R. Co. v. Goodwin*, 30 Ill. 117; *Illinois Central R. Co. v. Phelps*, 29 Id. 447; *Vanderkar v. Rensselaer, etc. Co.*, 13 Barb. 390; *Halloran v. Harlem R. Co.*, 2 E. D. Smith, 257; as limited in *Brace v. N. Y. Central R. Co.*, 27 N. Y. 269.

³ *Brace v. N. Y. Central R. Co.*, 27 N. Y. 269; *Crawford v. N. Y. Central, etc. R. Co.*, 18 Hun, 108; *Coleman v. Flint, etc. R. Co.*, 64 Mich. 160; 31 N. W. 47.

⁴ See *Brace v. N. Y. Central R. Co.*, 27 N. Y. 269, 277; *Halloran v. Harlem R. Co.*, 2 E. D. Smith, 257; *Perkins v. Eastern R. Co.*, 29 Me. 307.

city limits, does not relieve a railroad company from its statutory obligation to maintain fences and cattle-guards.⁵ In some states, such as Indiana, Illinois and Missouri, under statutes differently framed, the general presumption is that railroads are not required to be fenced in cities and villages.⁶ In other states, the fencing statutes expressly exclude cities and villages from their operation.⁷ But it is a universal rule that, unless plainly excepted by the statute, fences must be maintained in city limits, wherever it is not improper to do so,⁸ and especially where the railroad does not cross any streets actually opened for use.⁹

§ 436. Injury must be owing to defect in fence. — A railroad company is generally liable, under the statute of fences, only for animals entering upon the line at a place which the

⁵ *Crawford v. N. Y. Central R. Co.*, 18 Hun, 108. See § 433, *ante*.

⁶ Generally speaking, railroads are not required to fence, in cities and towns of Indiana (*Jeffersonville, etc. R. Co. v. Adams*, 43 Ind. 402; *Indianapolis, etc. R. Co. v. Harter*, 38 Id. 557); Illinois, Missouri (*Cousins v. Hannibal, etc. R. Co.* 66 Mo. 572); Minnesota (*Rippe v. Chicago, etc. R. Co.*, 42 Minn. 34; 43 N. W. 652); and Tennessee (*Hughes v. Nashville, etc. R. Co.*, 94 Tenn. 450; 29 S. W. 723).

⁷ As in *Nebraska* (Comp. Stat. 1895, § 4012; see *Union Pac. R. Co. v. Knowlton*, 43 Neb. 751; 62 N. W. 203).

⁸ A fence must be kept in a city, wherever it is not necessarily improper to do so (*Jeffersonville, etc. R. Co. v. Parkhurst*, 34 Ind. 501; *Iba v. Hannibal, etc. R. Co.*, 45 Mo. 469). The fact that the place where the accident occurred was within a city is not sufficient to excuse the company, if it might legally fence there (*Toledo, etc. R. Co. v. Owen*, 43 Ind. 405; *Jeffersonville, etc. R. Co. v. Parkhurst*, 34 Id. 501; *Toledo, etc. R. Co. v. Howell*, 38 Id. 447;

Wabash, etc. R. Co. v. Forshee, 77 Id. 158).

⁹ *Ells v. Pacific R. Co.*, 48 Mo. 231. "Where the corporation lines embrace portions of the adjacent country not actually laid out as a town, or so laid out that no streets cross the railroad, the reason for the exception does not apply, and the obligation to fence is as imperative as outside the corporation limits." (*Id.*) *S. P., Vanderworker v. Missouri Pac. R. Co.*, 51 Mo. App. 166; *Toledo, etc. R. Co. v. Cupp*, 9 Ind. App. 244; 36 N. E. 445. *S. P., Texas, etc. R. Co. v. Mitchell*, 2 Tex. App. Cas., §§ 373, 374. But if streets have been laid out and dedicated, they have become public highways, whether used as such or not, and the company is not required to fence them (*Meyer v. North Mo. R. Co.*, 35 Mo. 352; *Gerren v. Hannibal, etc. Co.*, 60 Id. 405). In Illinois, when an animal is killed near a village by a train, the presumption is that the houses compose the village, and if the town extends beyond the houses, the company must prove it (*Ewing v. Chicago, etc. R. Co.*, 72 Ill. 25).

company is bound to fence.¹ The fact that the fences are defective where the injury occurred is immaterial, if the animal injured entered at another place, where the fence was sufficient,² and such a case is governed by the common law.³ The burden of proof upon this point rests upon the plaintiff.⁴ But it is sufficient, for this purpose, to prove that the cattle were injured

¹ Great Western R. Co. v. Morthland, 30 Ill. 451; Perkins v. Eastern R. Co., 29 Me. 307; Cecil v. Pacific R. Co., 47 Mo. 246; Niemann v. Michigan Cent. R. Co., 80 Mich. 197; 44 N. W. 1049; St. Louis, etc. R. Co. v. Stapp, 53 Ill. App. 600; Illinois Cent. R. Co. v. Finney, 42 Ill. App. 390; Roberts v. Quincy, etc. R. Co., 49 Mo. App. 164; Leyden v. N. Y. Central R. Co., 55 Hun, 114; 8 N. Y. Supp. 187; Texas, etc. R. Co. v. Glenn, 8 Tex. Civ. App. 301; 30 S. W. 845. The complaint must aver that the cattle *entered* at a place which was not fenced (Toledo, etc. R. Co. v. Darst, 51 Ill. 365; 52 Id. 89; Wood v. Kansas City, etc. R. Co., 39 Mo. App. 63; Jeffersonville, etc. R. Co. v. Avery, 31 Ind. 277; see Indianapolis, etc. R. Co. v. Caudle, 60 Ind. 112). But where a company neglects to fence outside the corporate limits of a village, it is responsible for an accident caused by the presence of cattle on the track outside of such limits, although they first went upon the track inside the village (Atchison, etc. R. Co. v. Elder, 149 Ill. 173; 36 N. E. 565).

² Great Western R. Co. v. Morthland, 30 Ill. 451; Galena, etc. R. Co. v. Griffin, 31 Id. 303; St. Louis, etc. R. Co. v. Linder, 39 Id. 433; Bennett v. Chicago, etc. R. Co., 19 Wisc. 145 [depot-grounds]; Missouri, etc. R. Co. v. Leggett, 27 Kans. 323; Brooks v. N. Y. & Erie R. Co., 13 Barb. 594. If the animal got on the track at a highway crossing, a defect in the fence is immaterial (Logansport,

etc. R. Co. v. Caldwell, 38 Ill. 280). It is the condition of the road at the place where the animals entered upon the track, and not that where they were killed, that is material (Indiana, etc. R. Co. v. Quick, 109 Ind. 295; s. p., Cincinnati, etc. R. Co. v. Parker, 109 Id. 235; Gallagher v. New England R. Co., 57 Conn. 442; 18 Atl. 786; Foster v. St. Louis, etc. R. Co., 90 Mo. 116; 2 S. W. 138). In McCandless v. Chicago, etc. R. Co. (45 Wisc. 365), company held not liable where plaintiff left cow uncared for on the street, and in order to reach water to drink, she had to cross a railroad. A similar case was that of Lawrence v. Milwaukee, etc. R. Co., 42 Id. 322; and see Curry v. Chicago, etc. R. Co., 43 Id. 665.

³ Rockford, etc. R. Co. v. Connell, 67 Ill. 216 [road not open six months]; see Chicago, etc. R. Co. v. Barrie, 55 Ill. 226, and cases in previous notes.

⁴ The burden rests upon the plaintiff to show that the injury was done at a point where the company is required to fence its tracks (Kyser v. Kansas City, etc. R. Co., 56 Iowa, 207; 9 N. W. 133; Comstock v. Des Moines, etc. R. Co., 32 Iowa. 376; Morrison v. New Haven R. Co., 32 Barb. 568; Lawrence v. Milwaukee, etc. R. Co., 42 Wisc. 322; Wabash, etc. R. Co. v. Brown, 2 Bradwell, 516; Wilson v. Wabash, etc. R. Co., 18 Mo. App. 258; Louisville, etc. R. Co. v. Thomas, 106 Ind. 10; Louisville, etc. R. Co. v. Spain, 61 Id. 460).

at a point where the road was not properly fenced,⁵ so long as it does not appear that they did not enter there. A railroad company is liable for injuries to cattle occurring at a place where the road need not be fenced, if they entered at another point through a breach in a fence which the company was bound to maintain;⁶ and so it is if cattle, having entered upon the road at a place where no fence was required, pass off again, and re-enter the road at a place where a fence was required but did not exist.⁷

§ 437. Effect of adjoining owner's agreement.—Where a railroad company has a valid contract with the owner of adjoining land, by which the latter agrees to erect and maintain the fence required by law,¹ or agrees that there shall be no

⁵It is presumed that an animal entered upon the track at the place where it was injured, if the track ought to have been fenced there and was not (*Walther v. Pacific R. Co.*, 55 Mo. 271; *Fickle v. St. Louis, etc. R. Co.*, 54 Id. 219; overruling *Cecil v. Pacific R. Co.*, 47 Id. 246, and other cases.) This rule is still maintained in Missouri (*Duke v. Kansas City, etc. R. Co.*, 39 Mo. App. 105). On the other hand, no presumption of negligence arises from the mere fact that horses were killed on a railway track where there was a lawful fence (*Warren v. Chicago, etc. R. Co.*, 59 Mo. App. 367).

⁶*Toledo, etc. R. Co. v. Howell*, 38 Ind. 447; *Wabash, etc. R. Co. v. Forshee*, 77 Id. 158; *Wabash, etc. R. Co. v. Tretts*, 96 Id. 450.

⁷Plaintiff's mare broke loose from him, entered upon the railroad track in a city, at a place where the company was not bound to fence, ran along the track about a mile, then wholly left the company's premises, again went upon the track, where it ought to have been fenced, and was struck and killed. The company was held to be liable (*Atchison, etc.*

R. Co. v. Cash, 27 Kans. 587). To precisely the same effect, *Jeffersonville, etc. R. Co. v. Lyon*, 72 Ind. 107. S. P., on a very artificial claim that the horse had been "abandoned" (*Toledo, etc. R. Co. v. Jackson*, 5 Ind. App. 547; 32 N. E. 793).

¹*Talmage v. Rensselaer, etc. R. Co.*, 13 Barb. 493; *Terre Haute, etc. R. Co. v. Smith*, 16 Ind. 102; *Indianapolis, etc. R. Co. v. Petty*, 25 Id. 413. This is the rule in Ohio, even though the insufficiency of the fence was caused by casualty and without negligence on the land-owner's part (*Pittsburgh, etc. R. Co. v. Smith*, 26 Ohio St. 124; *Cincinnati, etc. R. Co. v. Waterson*, 4 Id. 424). But the obligation to maintain the fence rests primarily upon the company, and until the company has either built the fences or paid the land-owner for doing it, and he has had sufficient time to do it, its liability continues (*Quimby v. Vermont Central R. Co.*, 23 Vt. 387). The burden of proof is not upon the plaintiff to prove that there was no contract that the owner of the ground should build the fence (*Great Western R. Co. v. Bacon*, 30 Ill. 347).

fence,² this agreement has generally been held a good defense for that company against any claim of such landowner, or of a grantee,³ or tenant⁴ of such land under him, founded upon the statute.⁵ And even if a fence, erected under such an agreement, is destroyed by the fault of the railroad company, this does not revive its statutory liability to such an adjoining occupant. His remedy is by an action for the value of the fence thus destroyed. He is not at liberty to leave the fence out of repair, and then to hold the company responsible for all the damage that may ensue.⁶ But under most statutes no agreement or act of a land-owner in relation to fences is a defense to an action brought by a third person, not claiming under such land-owner.⁷ Nor is any such agreement a defense to any other company than the one with which it was made, or to which it has been transferred.⁸

² *Macon, etc. R. Co. v. Vaughn*, 48 Ga. 464, followed in *Woolfolk v. Macon, etc. R. Co.*, 56 Id. 457; *Tower v. Providence, etc. R. Co.*, 2 R. I. 404. And see *Whittier v. Chicago, etc. R. Co.* (24 Minn. 394), where it was held that fences had been dispensed with by acquiescence.

³ *Terry v. N. Y. Central R. Co.*, 22 Barb. 574; *Easter v. Little Miami R. Co.*, 14 Ohio St. 48; see *Stearns v. Old Colony R. Co.*, 1 Allen, 493; *McCool v. Galena, etc. R. Co.*, 17 Iowa, 461. But a mere verbal waiver of the duty to fence does not bind the grantee (*St. Louis, etc. R. Co. v. Todd*, 36 Ill. 409).

⁴ *Tombs v. Rochester, etc. R. Co.*, 18 Barb. 583; *Duffy v. Harlem R. Co.*, 2 Hilt. 496; *Cincinnati, etc. R. Co. v. Waterson*, 4 Ohio St. 424; *Indianapolis, etc. R. Co. v. Petty*, 25 Ind. 413; *St. Louis, etc. R. Co. v. Washburn*, 97 Ill. 253.

⁵ Doubt is thrown upon all the New York decisions by the observations of Peckham, J., in a later case in the Court of Appeals, in which he strongly intimates that railroad companies cannot thus evade their

liabilities, but must repair the fences, and content themselves with recovering the expenses from the land-owner (*Shepard v. Buffalo, etc. R. Co.*, 35 N. Y. 641). But the rule is too well settled in other states to be affected by this opinion.

⁶ See *Terry v. N. Y. Central R. Co.*, 22 Barb. 574, which did not perhaps decide this precise point.

⁷ *Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42; *Jeffersonville, etc. R. Co. v. Nichols*, 30 Ind. 321; see *New Albany, etc. R. Co. v. Maiden*, 12 Id. 10; *Cincinnati, etc. R. Co. v. Ridge*, 54 Id. 39; *Warren v. Keokuk, etc. R. Co.*, 41 Iowa, 484. As to third persons, the company cannot relieve itself from its duty to fence by contracting with the adjacent owner that he should do it (*Gill v. Atlantic, etc. R. Co.*, 27 Ohio St. 240; *Pittsburgh, etc. R. Co. v. Allen*, 40 Id. 206). By inadvertence the Ohio legislature abolished this sound rule, in 1874 (*Baltimore, etc. R. Co. v. Wood*, 47 Ohio St. 431; 24 N. E. 1077).

⁸ *Shepard v. Buffalo, etc. R. Co.*, 35 N. Y. 641.

§ 438. Employment of adjacent owner to build fence.—

A railroad company does not escape responsibility to an adjoining land-owner, under the statute, by merely employing him to *build* the fence.¹ The entire duty of the *maintenance* must be cast upon him by the contract, in order to have the effect of relieving the company from liability to him, except indeed so far as the injury of which he complains is the immediate result of his own failure to comply with the terms of his contract. Thus if, being employed to construct a fence, the land-owner left a gap in it, through which his cattle walked upon the track, he should not be allowed to recover for their loss ; but if he made the fence so badly that it fell down the next day, the company should be held responsible for its non-repair within a reasonable time, just as in case of a breach in the fence from any other cause. Still less is it any defense that the fence which proved insecure was one erected by the plaintiff voluntarily, without any contract.² In such case, the most palpable defects are no excuse to the company.³

§ 439. Adjacent owner's option to build fence.—In Ohio, Illinois, Wisconsin and Texas, an adjacent land-owner, in case of the failure of a railroad company to build or repair a proper fence, after the statutory notice has been given, may build or repair it himself, and may recover the value thereof from the company.¹ But this is optional with him ; and his omission to do so does not relieve the company from its statutory liability.² If, however, he does so construct a fence and recovers its value, he cannot recover from the company any damages for injuries to his cattle, arising from the insufficiency of the fence which he built. In Indiana, persons owning land separated by a railroad may maintain driveways across the road, and are required to maintain substantial gates, and keep them locked. The

¹ Illinois Central R. Co. v. Swearingen, 33 Ill. 289 ; Norris v. Androscoggin R. Co., 39 Me. 273.

² Jeffersonville, etc. R. Co. v. Sullivan, 38 Ind. 262.

³ Wilson v. Ontario, etc. R. Co., 12 U. C. [Q. B.], 463.

¹ Ohio R. S. (1896), § 3325. Illinois Stat. April 5, 1869 ; R. S. (1895), ch. 114, pars. 51, 52. It being the duty

of the company to build the fence, it ought to be required to pay for the same as fast as any considerable portion of the work is completed (Toledo, etc. R. Co. v. Sieberns, 63 Ill. 217).

² Texas, etc. R. Co. v. Young, 60 Tex. 201. See *dictum* to the contrary, Martin v. Stewart, 73 Wisc. 553 ; 41 N. W. 538.

railroad company is not held to the statutory liability for animals entering upon the track through such gates.²

§ 440. Compensated owner of land cannot recover.—In Massachusetts, the owner of land adjoining a railroad cannot recover against the railroad company, under the statute, if either he, or any person under whom he claims title, sold to the company the land upon which the track is laid, prior to the passage of the act of 1846; because the person thus selling received, in the price, compensation for all the disadvantages of the road, including the dangers arising from want of fences.¹ And in other states, the award and payment of compensation for the maintenance of fences is a good defense against persons claiming under the person so compensated,² though not against any others.³ The burden of proving such award and payment lies upon the company.⁴

§ 441. Company's agreement to fence.—Under a mere contract to fence, entered into by a railroad company, it is not liable for injuries suffered by cattle, where its servants have not been negligent in any other respect than in the mere omission to maintain the fence.¹ The utmost consequence of that neglect is to give implied permission for the entry of the cattle upon the road, and to make it the duty of the company to manage its business in such manner as ordinary care

¹ Ind. R. S. (1894), §§ 5320, 5322. A company is not liable, if no negligence on its part is shown, for animals killed or injured which entered upon the track at such a private crossing, at which was no gate, cattle-guard, or any obstacle (Louisville, etc. R. Co. v. Etzler, 119 Ind. 39; 21 N. E. 466.)

¹ Stearns v. Old Colony R. Co., 1 Allen, 493.

² Terry v. N. Y. Central R. Co., 22 Barb. 574; Milliman v. Oswego, etc. R. Co., 10 Id. 87, per Brown, J., Marsh v. N. Y. & Erie R. Co., 14 Barb. 364; conceded in Corwin v. N. Y. & Erie R. Co., 13 N. Y. 42, 49; Georgia, etc. R. Co. v. Anderson, 33 Ga. 110; Rockford,

etc. R. Co. v. Lynch, 67 Ill. 149. A release of all damages and claims thereto to all his other lands by reason of the construction and operation of a railway does not apply to the double damages given by the Missouri fencing statute (Stoutimore v. Chicago, etc. R. Co., 39 Mo. App. 257).

³ Corwin v. N. Y. & Erie R. Co., 13 N. Y. 42.

⁴ Cincinnati, etc. R. Co. v. Hoffhines, 46 Ohio St. 643; 22 N. E. 871; Toledo, etc. R. Co. v. Pence, 71 Ill. 174. Otherwise, under the Kentucky statute (Louisville, etc. R. Co. v. Belcher, 89 Ky. 193; 12 S. W. 195).

¹ Drake v. Phil. & Erie R. Co., 51 Pa. St. 240.

would require, where cattle may lawfully wander up and down the road. Neither is the company liable if the owner of the cattle proximately contributed to the injury by his fault,² otherwise than by merely allowing them to stray upon the track. In Pennsylvania, it is further held, in effect, that the measure of damages for the breach of such a contract is the cost of replacing the fence, and that such breach gives no license for the entry of cattle upon the road.³ But in all other courts, the opposite doctrine is established; and a railroad company is liable for damage done by the negligent management of the trains or tracks, to animals belonging to the other party to the contract, which stray upon the road, in consequence of the failure of the company to keep such a fence as it had agreed to maintain.⁴ We are of opinion that this latter doctrine is correct. The object of the contract for a fence is clearly to keep cattle off the track; and the railroad company having undertaken to effect this, the person with whom such a contract is made has a right to presume that the company has performed its duty, and may properly allow his cattle to run at large in any place from which they cannot stray upon the railroad, so long as the fence is maintained. If, indeed, their owner has actual or constructive notice of a defect in the fence, he ought to use ordinary care to prevent the cattle from passing through it, and should not recover for damage suffered by him which might have been avoided by the use of such care. His remedy in such case would be to recover for the expense and trouble to which he was put in taking the necessary precautions to keep his cattle from straying upon the road. An agreement between the company and an adjoining owner, by which the former binds itself to erect a part of the fences and guards required by statute, does not waive the

² Joliet, etc. R. Co. v. Jones, 20 Ill. 221.

³ Drake v. Philadelphia & Erie R. Co., 51 Pa. St. 240.

⁴ Fernow v. Dubuque, etc. R. Co., 23 Iowa, 528; Louisville, etc. R. Co. v. Sumner, 106 Ind. 55; 5 N. E. 404; Chicago, etc. R. Co. v. Barnes, 116 Ind. 126; 18 N. E. 459. A contract by

a railroad company to fence its track through certain lands imposes upon it the same duties and liabilities, with respect to the killing of stock, as would be imposed by a statute simply requiring it to fence (Gulf, etc. R. Co. v. Washington, 4 U. S. App. 121; 1 C. C. A. 286; 49 Fed. 347).

right of the land-owner to the full benefit of the statute;⁵ but a covenant to erect "good and sufficient fences" is performed by the erection of such fences as the statute requires.⁶

§ 442. Grants of right of way.—The mere grant of a right of way to a railroad company does not imply any contract, on either side, to fence the road.¹ Such a grant, made by a municipal corporation in the form of an ordinance, requiring the company to maintain fences and gates, is not a mere contract, but has also the force of positive law within the municipal limits.²

§ 443. Who may enforce contract to fence.—An agreement by a railroad company to maintain a fence runs with the land, and can be enforced against it by any subsequent purchaser.¹ It is also binding upon any other person or corporation purchasing the railroad, upon foreclosure of mortgage or otherwise.² In like manner, one who derives title from a land-owner who has agreed to maintain fences is bound to maintain them, and cannot avail himself of the fencing statutes.³

§ 444. Liability where one company uses another's track.—When by mere agreement, without actual lease or change of possession, a railroad company runs its trains over a track belonging to another company, and such track is not properly fenced, the authorities differ as to the liability incurred by the respective companies under statutes which confine liability to injuries directly inflicted by trains. On the one hand, it has

⁵ *Poler v. N. Y. Central R. Co.*, 16 N. Y. 476; *Shepard v. Buffalo, etc. R. Co.*, 35 Id. 641; see *White v. Concord R. Co.*, 30 N. H. 188.

⁶ *Thompson v. Harlem R. Co.*, 1 *Thomp. & C.* 411.

¹ *Louisville, etc. R. Co. v. Milton*, 14 B. Monr. 75.

² Under such an ordinance of a common council, a company was held liable for an injury to a child, which was found to have been caused by the want of suitable gates (*Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228).

¹ *Midland R. Co. v. Fisher*, 125 Ind. 19; 24 N. E. 756; *Bronson v. Coffin*, 108 Mass. 175; *Burbank v. Pillsbury*, 48 N. H. 475; see *Huston v. Cincinnati, etc. R. Co.*, 21 Ohio St. 235; *Wooliscroft v. Norton*, 15 Wisc. 198. *Morss v. Boston & Maine R. Co.*, 2 Cush. 536 is overruled.

² *Toledo, etc. R. Co. v. Burgan*, 9 Ind. App. 604; 37 N. E. 31; *Midland R. Co. v. Fisher*, 125 Ind. 19; 24 N. E. 756.

³ *Duffy v. Harlem R. Co.*, 2 *Hilton*, 496.

been held that the using company does not incur the absolute statutory liability, because it is not an "agent" of the owning company, nor in possession of the road.¹ On the other hand, it has been held that it is so liable, as being for the time "in possession," even under a statute not using such words.² Where four companies had a perpetual right to use a track in common, it was held that each of them was liable under a statute which said nothing about "lessees" or "possession."³ The *owner* of the road remains liable, wherever the *user* is not. All trains permitted by the owner to be run upon its road, while it is in full possession, are to be regarded as its trains, within the meaning of the statute.⁴ In Illinois, Texas and California, it would seem that both companies are subject to the full statutory liability in such cases.⁵

§ 445. Liability of lessees of road.—In New York, by express statute,¹ and in Vermont, Wisconsin and other states,² by judicial construction of the general fence laws, the lessee of a railroad is liable for the want of fences required by these laws. The lessor remains liable, even for injuries inflicted by trains of the lessee, if occurring through a defect in fencing which existed when the road was leased, or if it retains any

¹ Edwards v. Buffalo, etc. R. Co., 8 N. Y. App. Div. 390; 40 N. Y. Supp. 788; Ward, J., dissenting. S. P., Whitney v. Atlantic, etc. R. Co., 44 Me. 362; Wyman v. Penobscot, etc. R. Co., 46 Id. 162; Parker v. Rensselaer, etc. Co., 16 Barb. 315.

² Farley v. St. Louis, etc. R. Co., 72 Mo. 338; Ill. Central R. Co. v. Kanouse, 39 Ill. 272.

³ Tracy v. Troy, etc. R. Co., 38 N. Y. 433. S. P., Clement v. Canfield, 28 Vt. 632.

⁴ Dolan v. Newburgh, etc. R. Co., 120 N. Y. 571, 580; 24 N. E. 824; Toledo, etc. R. Co. v. Rumbold, 40 Ill. 143; Fontaine v. So. Pacific R. Co., 54 Cal. 645; East St. Louis, etc. R. Co. v. Gerber, 82 Ill. 302.

⁵ See Toledo, etc. R. Co. v. Rumbold, 40 Ill. 143; Fontaine v. So.

Pacific R. Co., 54 Cal. 645. Where the railroad is owned by one company, and leased to another, without special authority from the state, both companies are liable to the owner of the stock (Missouri Pac. R. Co. v. Dunham [Tex.] 4 S. W. 472).

¹ N. Y. Stat. 1864, ch. 582, § 2; embodied in the Railroad Law of 1892. Any one operating a railroad under a contract giving him general control for his own profit, is a lessee (Burchfield v. Northern Central R. Co., 57 Barb. 589).

² Clement v. Canfield, 28 Vt. 632; McCall v. Chamberlain, 13 Wisc. 637; see Wyman v. Penobscot, etc. R. Co., 46 Me. 162; Whitney v. Atlantic, etc. R. Co., 44 Id. 362; Toledo, St. L. etc. R. Co. v. Fenstermaker, 3 Ind. App. 151; 29 N. E. 440.

control over the road or the trains ; or if the statute, authorizing the lease, provided that the lessor should not be relieved from any obligation in this respect. But, in the absence of any such circumstances, it is held in New York that the lessor is not liable for the consequences of a failure on the part of the lessee to maintain the requisite fences, after taking exclusive possession of the road under a lease binding it to assume the duties of the lessor in this respect.³ In New York, since 1890,⁴ and in Indiana, the lessor and lessee are both liable by force of statute ;⁵ and the same rule has been established in California by judicial construction.⁶ Under the Iowa Act of 1868, where the lessor and lessee both operate trains on the same road, each is liable only for stock injured by its own trains, by reason of the road being unfenced.⁷ Before that act, the lessee was not liable for the want of a fence.⁸

§ 446. Liability of other parties.—The statute of Michigan, like the old statute of New York, makes agents of railroad companies, as well as the companies themselves, responsible for injuries to cattle while the road is unfenced. Under this provision it is held that a contractor having charge of the route, for the purpose of building the road, is an agent of the company, and liable for cattle lost by his neglect to make fences along the road, upon taking possession of the route ;¹ and that a lessee, or a corporation operating the road under a contract, is also thus liable as an agent ;² and so are trustees

³ *Ditchett v. Spuyten Duyvil, etc. R. Co.*, 67 N. Y. 425.

⁴ Gen. Railroad Law of 1890 and 1892, § 32, does not apply to a railroad company which had, before May 1, 1891, leased its road to another company, and given the other company exclusive possession and control thereof, but in such case the lessee alone is liable (*Throne v. Lehigh Val. R. Co.*, 88 Hun, 141 ; 34 N. Y. Supp. 525).

⁵ *Fort Wayne, etc. R. Co. v. Hinebaugh*, 43 Ind. 354 ; *Indianapolis, etc. R. Co. v. Solomon*, 23 Id. 534. Under the Indiana statute, the com-

pany may be sued in its own name, though its road be run by a lessee, assignee, or receiver (*Louisville, etc. R. Co. v. Cauble*, 46 Ind. 277 ; *McKinney v. Ohio, etc. R. Co.*, 22 Id. 99 ; *Ohio, etc. R. Co. v. Fitch*, 20 Id. 498).

⁶ *Fontaine v. So. Pacific R. Co.*, 54 Cal. 645.

⁷ *Stephens v. Davenport, etc. R. Co.*, 36 Iowa, 327.

⁸ *Liddle v. Keokuk, etc. R. Co.*, 23 Iowa, 378.

¹ *Gardner v. Smith*, 7 Mich. 410.

² *Bay City, etc. R. Co. v. Austin*, 21 Mich. 390.

under a mortgage for bondholders, while operating the road.³ An engineer in charge of the train by which cattle are injured is undoubtedly within this provision.⁴ But we have no doubt that only those agents who are actually concerned in producing the injury are liable under such a statute. It cannot be so construed as to hold an engineer on one train responsible for an injury inflicted by another train. Independent of statute, it is likely that an engineer would be liable for an injury caused by his own negligence, in any case in which his company would be liable.⁵ The present New York statute makes *every* person in possession of a railroad responsible for omission to maintain fences.⁶

§ 447. Application of fence laws to personal injuries.—The application of fence laws to personal injuries, and the extent to which they can be relied upon as enacted for the protection of persons, in distinction from property, will be discussed in Chapter XXI.¹

§ 448. For what injuries company is liable.—In New York, Illinois, Wisconsin, Indiana, Georgia, Mississippi, Tennessee, Texas, and perhaps other states, the stringent liability imposed by the fencing statutes applies only to injuries done *to* animals, and not to any done *by* animals, nor even to injuries suffered by animals, otherwise than from some affirmative act of the “engines, cars or agents” of such companies.¹ A railroad

³ Jones v. Seligman, 81 N. Y. 190. The appointment of a receiver of the road does not relieve the company from the duty and liability created by the statute (Ohio, etc. R. Co. v. Fitch, 20 Ind. 498; McKinney v. Ohio, etc. R. Co. 22 Id. 99).

⁴ Under a statute which declares a railway corporation and its agents liable for all damages which shall be done, by its agents or engines, to cattle, etc., before the erection of division fences and cattle-guards, an engineer, and a fireman who was the servant of the engineer, may be chargeable severally or jointly with the corporation (Suydam v. Moore,

8 Barb. 358). And see Corwin v. N. Y. & Erie R. Co. 13 N. Y. 42. So held under the Vermont statute (St. Johnsbury, etc. R. Co. v. Hunt, 59 Vt. 294; 7 Atl. 277).

⁵ See Vandegrift v. Rediker, 22 N. J. Law, 185; also Ft. Wayne, etc. R. Co. v. Hinebaugh, 43 Ind. 354.

⁶ The Railroad Law, 1892, § 32.

¹ See § 466a, *post*.

¹ Plaintiff's horse went through a gap in the railroad fence to the track, and ran along the track until it fell into a bridge and broke its legs. Held, the company was not liable; and the court said that the language

company cannot, therefore, be held responsible, solely by virtue of these statutes, for an injury inflicted by an animal upon itself, though caused by its entanglement in the works of the road, as by falling into a bridge, trestle or well.² It has further been held, in nearly all these states, that there is no statutory liability for injuries which are the result of fright, so long as the animal is not actually touched by any part of a train.³ This, we think, is at least open to much question. In Oregon, the opposite ruling is made under a similar statute.⁴ In Mis-

of the statute "clearly requires some action on the part of the company to produce the injury, either by mechanical or other agents of its own, and, in our judgment, excludes the idea of liability for injuries which the cattle may do to themselves by straying on the track. The word agent, of itself, implies an actor. In the present case, whatever action produced the injury was that of the colt in running on the bridge, or of the plaintiff himself in driving him there in the effort to recapture him" (Knight v. N. Y., Lake Erie, etc. R. Co., 99 N. Y. 25). See cases under next two notes.

²The company is not liable where cattle got through a defective fence and were drowned in an unenclosed well situated on the company's right of way (Hughes v. Hannibal, etc. R. Co., 66 Mo. 325); nor where a horse getting on the track through a defective fence, and frightened by the whistle and bell-ringing, ran into the company's wire fence (Indiana, etc. R. Co. v. Schertz, 12 Bradwell, 304); nor where a horse was killed by the servants of the company in an attempt to extricate it from a trestle into which it had fallen (Seibert v. Missouri, etc. R. Co., 72 Mo. 565). To same effect, see cases in next note. But see a case of willful injury to a colt on a trestle (Ft.

Wayne, etc. R. Co. v. O'Keefe, 4 Ind. App. 249; 30 N. E. 916).

³So held in *New York* (Hyatt v. N. Y., Lake Erie, etc. R. Co., 65 Hun, 625; 21 N. Y. Supp. 479). So in *Indiana*, under both the old statute (Ohio, etc. R. Co. v. Cole, 41 Ind. 331; Peru, etc. R. Co. v. Hasket, 10 Id. 400; Indianapolis, etc. R. Co. v. McBrown, 46 Id. 229; Baltimore, etc. R. Co. v. Thomas, 60 Id. 107), and the new (Louisville, etc. R. Co. v. Thomas, 106 Ind. 10; 5 N. E. 198; Jeffersonville, etc. R. Co. v. Dunlap, 112 Ind. 93; 13 N. E. 403); in *Georgia* (East Tenn. R. Co. v. Watters, 77 Ga. 69); *Mississippi* (Georgia Pac. R. Co. v. Money [Miss.], 8 So. 646 [falling in trestle]); *Tennessee* (Holder v. Chicago, etc. R. Co., 11 Lea, 176; Nashville, etc. R. Co. v. Sadler, 91 Tenn. 508; 19 S. W. 618); *Texas* (International, etc. R. Co. v. Hughes, 68 Tex. 290; 4 S. W. 492 [trestle]; Texas, etc. R. Co. v. Mitchell, 17 S. W. 1079), and under the old statute of *Missouri* (Lafferty v. Hannibal, etc. R. Co., 44 Mo. 291; Foster v. St. Louis, etc. R. Co., 90 Id. 116; 2 S. W. 138).

⁴Where a horse getting on an unfenced track is chased by the train to a trestle, and there falls and is injured, the moving train "caused the injury," whether there was actual collision or not (Meeker v. Northern Pac. R. Co., 21 Oreg. 513; 28 Pac. 639).

souri, the contrary rule is now prescribed by statute.⁵ Where, as in Minnesota, Michigan, Iowa, Nebraska and Kansas, railroad companies are made responsible for *all* damages sustained in consequence of their neglect to fence, these narrow rules have no application, and the companies are liable for injuries suffered by animals through fright,⁶ and also for injuries to the land or crops of adjoining owners, through the entrance of cattle straying over an unfenced railroad.⁷ A railroad company is, however, responsible for injuries of any kind, suffered through its want of ordinary care toward animals entering upon the track through a defective fence.⁸

§ 449. Who entitled to benefit of statutes.—The benefit of the American fencing statutes is, in most states, held to be not confined to owners or occupants of land immediately adjoining a railroad, but to extend to all owners of animals, although trespassing on the adjoining land.¹ But in England, Canada, Maine, New Hampshire, Vermont, Massachusetts and West Virginia, the statutes are construed as being only for the

⁵ See *Perkins v. St. Louis, etc. R. Co.*, 103 Mo. 52; 15 S. W. 320.

⁶ So in *Kansas* under Gen. St. 1889. (*Missouri Pac. R. Co. v. Gill*, 49 Kans. 441; 30 Pac. 414 [mare frightened into wire fence]); in *Minnesota* (*Maher v. Winona, etc. R. Co.* 31 Minn. 401 [similar case]); and *Nebraska* (*Fremont, etc. R. Co. v. Pounder*, 36 Neb. 247; 54 N. W. 509).

⁷ *Pound v. Port Huron, etc. R. Co.*, 54 Mich. 13; *St. Louis, etc. R. Co. v. Sharp*, 27 Kans. 134; *Donald v. St. Louis, etc. R. Co.*, 44 Iowa, 157.

⁸ *Graham v. Delaware, etc. Canal Co.*, 46 Hun, 336 [horse falling in cut]; *Gould v. Bangor, etc. R. Co.*, 82 Me. 122; 19 Atl. 84 [colt entangled in defective fence]. But not for double damages (*Grau v. St. Louis, etc. R. Co.*, 54 Mo. 240).

¹ So held in *New York*, under the statute of 1854 (*Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42); and under

the Railroad Law of 1890 and 1892 (*Dayton v. N. Y. Lake Erie, etc. R. Co.*, 81 Hun, 284; 30 N. Y. Supp. 783); *Indiana* (*New Albany, etc. R. Co. v. Aston*, 13 Ind. 545; *Indianapolis, etc. R. Co. v. Meek*, 10 Id. 502); *Ohio*, under the statute of 1859 (*Marietta, etc. R. Co. v. Stephenson*, 24 Ohio St. 48), and also that of 1874 (*Pittsburgh, etc. R. Co. v. Allen* 40 Ohio St. 206); *Missouri* (*Kaes v. Mo. Pacific R. Co.*, 6 Mo. App. 397; but see *Berry v. St. Louis, etc. R. Co.*, 65 Mo. 172; *Harrington v. Chicago, etc. R. Co.*, 71 Id. 384; *Ferris v. St. Louis, etc. R. Co.*, 30 Mo. App. 122); *Wisconsin* (*Laude v. Chicago, etc. R. Co.*, 33 Wisc. 640; see *Veerhusen v. Chicago, etc. R. Co.*, 53 Id. 689); and *Kansas* (*Mo. Pacific R. Co. v. Roads*, 33 Kans. 640; see *Sherman v. Anderson*, 27 Id. 333). In *Pennsylvania*, a special act for the protection of farmers and owners of cattle *along the line* of railroads is held to apply to cattle pastured on

benefit of owners or occupants of adjoining land,² or owners of animals lawfully upon that land.³ And, therefore, while the negligence of the adjoining owner in permitting his cattle to stray upon a highway, crossing the road, is no defense to his action,⁴ a railroad company is not liable to any one for a failure to fence out cattle unlawfully straying upon a highway running next to and *parallel* with the railroad.⁵ But the company is bound to fence against cattle *lawfully* upon the highway.⁶ Under the English statute, which requires railway companies to keep a gate closed where the road crosses a highway, they are liable, if they leave the gate open, for cattle killed by getting on the track in consequence, without reference to whether such cattle were, as between their owners and the public, lawfully on the highway.⁷

§ 450. Notice of defect, when to be given.—After a proper fence has been erected, it is the duty of every person interested in its maintenance to make reasonable efforts to give notice to the railroad company of any defects in it, subse-

land near to, but not adjoining, the railroad (Dunkirk, etc. R. Co. v. Mead, 90 Pa. St. 454).

² Ricketts v. East India Docks, etc. R. Co., 12 C. B. 160; Allen v. Boston, etc. R. Co., 87 Me. 326; 32 Atl. 963; Jackson v. Rutland, etc. R. Co., 25 Vt. 150; Morse v. Rutland, etc. R. Co., 27 Id. 49; Bemis v. Conn. etc. R. Co., 42 Id. 375; Mayberry v. Concord R. Co., 47 N. H. 391; Morse v. Boston, etc. R. Co., 66 N. H. 148; 28 Atl. 286; Hill v. Concord, etc. R. Co., [N. H.] 32 Atl. 766; Eames v. Salem, etc. R. Co., 98 Mass. 560; Maynard v. Norfolk, etc. R. Co., 40 W. Va. 331; 21 S. E. 733; Dolrey v. Ontario, etc. R. Co., 11 Upper Can. [Q. B.], 600; Gillis v. Great Western R. Co., 12 Id. 427; Wilson v. Northern R. Co., 28 Id. 274.

³ One whose animal is in a field adjoining the railroad by license of the occupier, is himself an adjoining occupier (Dawson v. Midland R. Co., L. R. 8 Exch. 8). s P., Smith v. Barre

R. Co., 64 Vt. 21; 23 Atl. 632; McCoy v. So. Pacific R. Co., 94 Cal. 568; 26 Pac. 629; Hendrix v. St. Joseph, etc. R. Co., 38 Mo. App. 520; Brandenburg v. St. Louis, etc. R. Co., 44 Id. 224. It is no defense that the stock came over the premises of an adjoining proprietor, unless such premises were inclosed by a lawful fence (Dean v. Omaha, etc. R. Co., 54 Mo. App. 647). See Young v. Kansas City, etc. R. Co., 39 Mo., App. 52.

⁴ Fawcett v. York & North Midland R. Co., 16 Q. B. 610.

⁵ Manchester, etc. R. Co. v. Wallis, 14 C. B. 213.

⁶ Where a colt, while driven along a highway, escaped upon a railroad through a gate negligently left open by the company, and was killed by a passing train, the company was held responsible (Midland R. Co. v. Daykin, 17 C. B. 126).

⁷ Fawcett v. York & North Midland R. Co., 16 Q. B. 610.

quently arising,¹ which may come under his actual notice ; and if he fails to do so, he cannot recover any damage which he may sustain by reason of such defect,² unless it was known to some agent of the company, whose duty it was to communicate information of the fact to the officers having charge of such matters,³ or could have been ascertained by reasonable diligence.⁴ But he is under no obligation to inspect the fence for the purpose of finding out defects. He has a right to rely upon the company's performance of its duty.⁵

§ 451. **Contributory negligence on fenced roads.**—When a road is properly fenced, all the usual rules as to contributory negligence apply. Thus the plaintiff cannot recover if, without any valid special excuse, he drives a horse close up to the

¹ Notice of *original* defects not required (Chicago, etc. R. Co. v. Finch, 42 Ill. App. 90).

² Chicago, etc. R. Co. v. Seirer, 60 Ill. 295. In *Poler v. N. Y. Central R. Co.* (16 N. Y. 476), Selden, J., said : "There is no doubt that although the statute imposes upon the railroad company the absolute duty of maintaining fences, gates, etc., yet a duty in this respect also devolves upon the proprietors along the road. They have no right quietly to fold their arms and voluntarily to permit their cattle to stray upon the railroad track, through the known insufficiency of the fences which the corporation are bound to maintain. As it would be impracticable for the railroad company to keep a constant watch of every gate and every rod of fence along the line of its road, it is but reasonable to require the proprietors, when defects have actually come to their knowledge, to make suitable efforts to apprise the company of such defects. In enforcing this rule, however, upon proprietors, care should be taken not to exempt the company, upon which the primary duty rests, from its due share of responsibility. It will be found

impossible to define with precision the relative obligation of the parties in this respect, and it must result in most cases in a question to be addressed to the sound discretion of a jury." In that case, however, it was held that the plaintiff was not in fault in this respect. Defendant was not liable for injuries to stock occasioned by defects in a fence erected by it, originally sufficient, unless it had notice of the defects, or might have known them if it had used due care in maintaining the fence (*Vinyard v. St. Louis, etc. R. Co.*, 80 Mo. 92 ; and see *Fitterling v. Mo. Pacific R. Co.*, 79 Id. 504).

³ An instruction to the jury that the mere fact that hands working in a gravel pit for the company had notice of the defect, would not bind the company, but that notice, to be binding, must be proved to have come to some person or agent connected with the keeping or repair of fences, Held, properly refused (*Indianapolis, etc. R. Co. v. Truitt*, 24 Ind. 162).

⁴ See § 425, *ante*.

⁵ *Pittsburgh, etc. R. Co., v. Smith*, 38 Ohio St. 410 ; *McCoy v. So. Pacific R. Co.*, 91 Cal. 568 ; 26 Pac. 629.

track, just as a train is coming,¹ or where an engine is letting off steam,² or between trains, in a dangerous position,³ or even beside a railroad, if the horse is known to be afraid of trains.⁴ So, also, if he leaves a horse unfastened and unattended at a railroad station,⁵ especially if he is nervous, and afraid of trains.⁶ But not so, if the horse is known *not* to be afraid of trains.⁷ Even fastening or holding a timid horse, under such circumstances, may be negligence, if it is known to be liable to fright⁸ or inexperienced.⁹ Where one leaves a fence-gate open,¹⁰ or makes a breach in the fence, or makes such alterations in a fence or gate that animals can push through,¹¹ neither he nor his tenant¹² take any benefit from fence laws, in case his animals enter through an opening thus made; and such animals will, as against him, be regarded as inexcusable trespassers.

§ 451a. Contributory negligence on unfenced roads.—

As a general proposition, the contributory negligence of a cattle-owner, entitled to the benefit of the statute, in unlawfully allowing his cattle to stray, whereby they enter upon a railroad, at a place not fenced as required by law, is no defense to an action under the fence laws of New York, Vermont, New Hampshire, Ohio, Indiana, Minnesota, Nebraska, Alabama,

¹ Whitney v. Maine Cent. R. Co., 69 Me. 208; Rhoades v. Chicago, etc. R. Co., 58 Mich. 263.

² Louisville, etc. R. Co. v. Schmidt, 81 Ind. 264.

³ Thompson v. Cincinnati, etc. R. Co., 54 Ind. 197. Compare Borst v. Lake Shore, etc. R. Co., 66 N. Y. 639.

⁴ Philadelphia, etc. R. Co. v. Stinger, 78 Pa. St. 219 [driving a horse known to be afraid of locomotives on a highway adjoining a railroad]; Pittsburgh So. R. Co. v. Taylor, 104 Pa. St. 306 [obstruction at a crossing known to have frightened other horses].

⁵ Edwards v. Philadelphia, etc. R. Co., 148 Pa. St. 531; 23 Atl. 894.

⁶ Olson v. Chicago, etc. R. Co., 81 Wisc. 41; 50 N. W. 412, 1096.

⁷ Southworth v. Old Colony, etc. R. Co., 105 Mass. 342.

⁸ St. Louis, etc. R. Co. v. Payne, 29 Kans. 166 [horse tied]; Kalem-bach v. Michigan Cent. R. Co., 87 Mich. 509; 49 N. W. 1082 [driver unloading].

⁹ Flagg v. Chicago, etc. R. Co., 96 Mich. 30; 55 N. W. 444.

¹⁰ Diamond Brick Co. v. N. Y. Central R. Co., 58 Hun, 396; 12 N. Y. Supp. 22.

¹¹ An owner who has changed the fastenings of the railroad's farm-crossing gate, so that an animal can open it by rubbing against it, can hold the company liable for nothing but gross negligence (Chicago, etc. R. Co. v. Dannel, 48 Ill. App. 251).

¹² Manwell v. Burlington, etc. R. Co., 80 Iowa, 662; 45 N. W. 568.

North Carolina and other states.¹ The owner of cattle is not necessarily deprived of the benefit of the statute, by his turning cattle into a field of his own, or one which he has a common right to use, adjoining the railroad, although he knows it to be insufficiently fenced or not fenced at all.² He is not

¹ See § 421, *ante*. So held in *New York* (Shepard v. Buffalo, etc. R. Co., 35 N. Y. 641; Corwin v. N. Y. & Erie R. Co., 13 N. Y. 42); *Vermont* (Mead v. Burlington, etc. R. Co., 52 Vt. 278; but compare *Trow v. Vt. Central R. Co.*, 24 Id. 487); *New Hampshire* (Cressey v. Northern R. Co., 59 N. H. 564); *Indiana* (Chicago, etc. R. Co. v. Brannegan, 5 Ind. App. 540; 32 N. E. 790; Louisville, etc. R. Co. v. Whitesell, 68 Ind. 297); While it is uniformly held in *Indiana*, that a complaint at common law for the cause of negligence must allege that plaintiff was free from negligence (*Indianapolis, etc. R. Co. v. Robinson*, 35 Ind. 380), yet in an action under the statute for killing stock, such averment is necessary (*Jeffersonville, etc. R. Co. v. Lyon*, 55 Id. 477). It is not enough to allege that the road was not fenced according to law (*Jeffersonville, etc. R. Co. v. Underhill*, 40 Id. 229); *Iowa* (*Krebs v. Minneapolis, etc. R. Co.*, 64 Iowa, 670; 21 N. W. 131 [cattle unlawfully at large at night]; *Anderson v. Chicago, etc. R. Co.*, 61 N. W. 1058); *Nebraska* (*Burlington, etc. R. Co. v. Webb*, 18 Neb. 215; 24 N. W. 706; *Chicago, etc. R. Co. v. Sims*, 17 Neb. 691; 24 N. W. 388); *Alabama* (*Alabama, etc. R. Co. v. McAlpine*, 71 Ala. 545); *North Carolina* (*Bethea v. Raleigh, etc. R. Co.*, 106 N. C. 279; 10 S. E. 1045). In *Wisconsin*, the rule was otherwise, under the old statute; but since 1881 the New York rule is followed (*Heller v. Abbot*, 79 Wisc. 409; 48 N. W. 598; *Quackenbush v. Wisconsin, R. Co.*, 71 Wisc. 472; 37 N. W. 834), al-

though contributory negligence is a defense even for an unfenced railroad. In *Minnesota* (*Fleming v. St. Paul, etc. R. Co.*, 27 Minn. 111; 6 N. W. 448; *Johnson v. Chicago, etc. R. Co.*, 29 Minn. 425; 13 N. W. 673), merely allowing cattle to run at large is not such contributory negligence as will defeat a recovery under the statute (*Watier v. Chicago, etc. R. Co.*, 31 Minn. 91; 16 N. W. 537; *Ericson v. Duluth, etc. R. Co.*, 57 Minn. 26; 58 N. W. 822). In *Oregon*, the statute preserves the defense of contributory negligence, but declares that allowing stock to run on common ranges or on their owner's unclosed land, is not such negligence (§§ 4044-4049; see *Hindman v. Oregon R. Co.*, 17 Oreg. 614; 22 Pac. 116).

² *Shepard v. Buffalo, etc. R. Co.*, 35 N. Y. 641; *Jeffersonville, etc. R. Co. v. Nichols*, 30 Ind. 321; *Gardner v. Smith*, 7 Mich. 410; *Kuhn v. Chicago, etc. R. Co.*, 42 Iowa, 420; *Lee v. Minneapolis, etc. R. Co.*, 66 Id. 131; *McCoy v. California, etc. R. Co.*, 40 Cal. 532; *Wilder v. Maine Central R. Co.*, 65 Me. 332; *Cleveland, etc. R. Co. v. Scudder*, 40 Ohio St. 173; *Pittsburgh, etc. R. Co. v. Smith*, 38 Id. 410; *Davis v. Hannibal, etc. R. Co.*, 19 Mo. App. 425; *Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326; 13 So. 377; *Donovan v. Hannibal, etc. R. Co.*, 89 Mo. 147; 1 S. W. 232; *Gulf, etc. R. Co. v. Cash*, 8 Tex. Civ. App. 569; 28 S. W. 387. "The plaintiff had the legal right to permit his cattle to run at large. . . . The exercise of a mere legal right surely

bound to forego the use of his property in consequence of the company's negligence. The fact that the plaintiff was employed by the company to build the fence which has proved defective,³ or that he built it of his own accord,⁴ is no defense. But the owner of cattle, who allows them to stray, may sometimes fail to recover their loss from a railroad company, through the negligence of other persons. Thus if cattle are allowed to stray upon premises adjoining a railroad properly fenced, and the owner of that land carelessly leaves open a gate leading to the railroad, through which the cattle stray upon the track, the owner of the cattle cannot recover for injuries suffered by them while thus upon the track.⁵ Here, however, the company is not really in fault; and the issue of contributory negligence is not perhaps involved. Where the fence is carried away by a cause beyond the control of the company, one who leaves his cattle in the adjoining field, either after the actual destruction of the fence, and before the company has had reasonable time to repair it, or after it is manifest to a reasonable man that it will be thus destroyed, cannot recover if the cattle stray upon the track.⁶ There are

cannot be negligence. Nor can the railroad company by the neglect of its duty abridge the legal rights of the public. If it is negligence for the farmer, who knows that his cattle frequent a dangerous crossing, to permit them to run at large unattended, then the railroad company may, by constructing its crossings in a notoriously dangerous manner, compel farmers in the vicinity to restrain their cattle within inclosures, and thus deprive them of the right which the law gives to permit them to run at large" (*Kuhn v. Chicago, etc. R. Co.*, 42 Iowa, 420).

³ See § 438, *ante*; *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Illinois Central R. Co. v. Swearingen*, 33 Ill. 289.

⁴ See § 538, *ante*

⁵ *Indianapolis, etc. R. Co. v. Shimer*, 17 Ind. 295; *Ellis v. Southwestern R. Co.*, 2 Hurlst. & N. 424;

Adams v. Atchison, etc. R. Co., 46 Kans. 161; 26 Pac. 439; see *Illinois Cent. R. Co. v. McKee*, 43 Ill. 119.

⁶ In *Indianapolis, etc. R. Co. v. Wright* (13 Ind. 213), plaintiff knew the fence was likely to be carried off by a flood, but refused to turn his cattle out of the field. In the night the fence was thus carried away; the cattle, straying upon the track, were killed by an engine of the defendant. Held, plaintiff could not recover. One who, knowing that a severe storm on Saturday had prostrated fences, turned his cattle upon uninclosed lands on Monday without inquiry as to whether the railroad fences abutting thereon were injured, is guilty of such contributory negligence as will defeat a recovery for injuries sustained by such cattle upon the railroad track (*Carey v. Chicago, etc. R. Co.*, 61 Wisc. 71; 20 N. W. 648).

decisions in Indiana⁷ which, at first sight, might seem to hold that the act of a cattle-owner, in allowing his cattle to stray on or near a place against which the railroad company is not bound to fence, is such contributory negligence as defeats his claim for injuries to them, no matter where it occurs; but they do not really establish anything more than the rule already stated,⁸ that no recovery can be had, if the cattle entered at a point where no fence was required by law. If they go further than this, they are not applicable to cases arising under such statutes as that of New York. Some acts of contributory negligence constitute a good defense everywhere;⁹ while others are admitted as a defense by statute in a few states, such as Minnesota, Wisconsin and Oregon.¹⁰ But in some

⁷ *Wabash, etc. R. Co. v. Nice*, 99 Ind. 152; see also *Cincinnati, etc. R. Co. v. Wood*, 82 Id. 593; *Cincinnati, etc. R. Co. v. Stanley* [Ind.], 27 N. E. 316. See *Chicago, etc. R. Co. v. Nash*, 1 Ind. App. 298; 27 N. E. 564.

⁸ § 434, *ante*.

⁹ Thus, any act of wanton exposure to danger, such as leaving cattle upon the highway unattended, between two railroad tracks upon which trains frequently passed (*Bunnell v. Rio Grande W. R. Co.* [Utah], 44 Pac. 927), or leaving cattle to wander unattended in the highway in the vicinity of a railroad crossing (*Hanna v. Terre Haute, etc. R. Co.*, 119 Ind. 316; 21 N. E. 903), or having an opening made through which his sheep stray on the track (*McCoy v. Southern Pac. Co.*, 94 Cal. 568; 29 Pac. 1110). And in Indiana, the owner of a blind horse having turned it loose upon a common adjoining the unfenced track of a railroad, it was held that he could not recover (*Knight v. Toledo, etc. R. Co.*, 24 Ind. 402). So held, also, where the owner turned out his horses with blind-bridles on (*St. Louis, etc. R. Co. v. Todd*, 36 Ill. 409). But where a bar was placed

in a particular manner at the request of the owner of cattle, which escaped upon the track in consequence of an error in the mode of placing the bar, it was held that he could not recover (*Enright v. San Francisco, etc. R. Co.*, 33 Cal. 230).

¹⁰ In those states in which contributory negligence is held to be a good defense, even where the railroad company has omitted to fence, yet it is uniformly held that the mere fact that the animals were trespassing or were wrongfully allowed to run about at large, does not amount to such negligence. "There must be some act or omission of the plaintiff approximately affecting the question of the exposure of the animal to danger or contributing to the accident" (*Watier v. Chicago, etc. R. Co.*, 31 Minn. 91; 16 N. W. 537; *Searles v. Milwaukee, etc. R. Co.*, 35 Iowa, 490; *Curry v. Chicago, etc. R. Co.*, 43 Wisc. 665, 684; *Rockford, etc. R. Co. v. Irish*, 72 Ill. 404; *Cairo, etc. R. Co. v. Murray*, 82 Id. 76). For examples of such negligence, are mentioned; the owner's carelessness in driving animals across the tracks, in turning out cattle known to be breachy, in leaving open a gate or bars next the track, exposing cattle,

cases which were nominally decided on this ground, the fact was that the fault was all on one side, and the railroad was sufficiently fenced.¹¹ When a railroad company is not in default as to its fences, the general rule as to contributory negligence applies, in full force; for example, as to animals which enter upon the road at a place where the company is not bound to fence.¹² If other parts of the road were not properly fenced, that would still be immaterial. When animals escape from the custody of their owner, notwithstanding he has used

at unreasonable times or in unusual manner, in turning them out where a lawful fence has suddenly been broken down, without fault of the owner and before sufficient time had elapsed to repair (*Johnson v. Chicago, etc. R. Co.*, 29 Minn. 425; 13 N. W. 673; citing *Robinson v. Grand Trunk, etc. R. Co.*, 32 Mich. 322; *Jones v. Sheboygan, etc. R. Co.*, 42 Wisc. 306; *Goddard v. Chicago, etc. R. Co.*, 54 Wisc. 548; 11 N. W. 593; *Aylesworth v. Chicago, etc. R. Co.*, 30 Iowa, 459; *Whittier v. Chicago, etc. R. Co.* 24 Minn. 394). In Wisconsin, the statute of 1881 (R. S. 1889, §1812), admitting the defense of contributory negligence, after fences have once been *constructed*, one who turns a colt into a pasture, knowing that a fence next the railroad is down, using no precaution to prevent the colt from going on the track, and being authorized by statute to rebuild the fence at the expense of the company, after notice and default, is guilty of contributory negligence, though he has no other pasture, and requests the company to repair the fence (*Martin v. Stewart*, 73 Wisc. 553; 41 N. W. 533; re-aff'd, *Peterson v. Wisconsin Cent. R. Co.*, 86 Wisc. 206; 56 N. W. 639).

¹¹ For example, a person turning his horse on the highway adjoining unfenced depot-grounds (*Schneekloth v. Chicago, etc. R. Co.*, Mich.

; 65 N. W. 663); or turning loose a horse known to be in the habit of passing over defendant's cattle-guard, that being conformable to law (*La Flamme v. Detroit, etc. R. Co.*, Mich. ; 67 N. W. 556).

¹² When cattle are turned loose by their owner, in violation of a city ordinance, and enter the track at a place where the railroad company has no right to fence, that is contributory negligence on his part, which constitutes a good defense for the company (*Van Horn v. Burlington, etc. R. Co.*, 59 Iowa, 33; 12 N. W. 752; s. c., again, 63 Iowa, 67; 18 N. W. 679; *Moser v. St. Paul, etc. R. Co.*, 42 Minn. 480; 44 N. W. 530; *Johnson v. Minneapolis, etc. R. Co.*, 43 Minn. 207; 45 N. W. 152). *Prima facie*, it is negligence for the owner of cattle or horses to allow them to run at large in cities or towns where a railroad cannot be legally fenced (*Cincinnati, etc. R. Co. v. Street*, 50 Ind. 225; *Jeffersonville, etc. R. Co. v. Underhill*, 48 Id. 389; *Lafayette, etc. R. Co. v. Shrier*, 6 Id. 141; and many other cases). It is otherwise where the cattle entered upon the railroad at a point where it ought to have been fenced (*Krebs v. Minneapolis, etc. R. Co.*, 64 Iowa, 670; 21 N. W. 131; *Lee v. Same*, 66 Iowa, 131; 23 N. W. 299; *Missouri, etc. R. Co. v. Bradshaw* [Kans.], 6 Pac. 917; *Watier v. Chicago, etc.*

ordinary care to keep them on his own premises, their straying raises no question of contributory negligence.¹⁸

§ 452. Owner's willful conduct.— These statutes are not to be so literally construed as to enable one who *willfully* turns his cattle upon an unfenced railroad,¹ or, knowing that they are

R. Co., 31 Minn. 91; 16 N. W. 537; Crawford v. N. Y. Central R. Co., 18 Hun, 109).

¹³ The mere fact that plaintiff's horse escaped from control, and passed on defendant's tracks through a gate which defendant had neglected to keep in repair, does not make him a trespasser, or preclude plaintiff's recovery (Taft v. N. Y., Providence, etc. R. Co., 157 Mass. 297; 32 N. E. 168). To same effect, Clark v. Boston, etc. R. 64 N. H. 323; 10 Atl. 676; Bulkley v. N. Y. & New Haven R. Co., 27 Conn. 479; Marietta, etc. R. Co. v. Stephenson, 24 Ohio St. 48; Ohio, etc. R. Co. v. Craycraft, 15 Ind. App. 335; 32 N. E. 297; Ohio, etc. R. Co. v. Jones, 63 Ill. 472; Chicago, etc. R. Co. v. Harris, 56 Id. 528; Story v. Chicago, etc. R. Co., 79 Iowa, 402; 44 N. W. 690; Pearson v. Milwaukee, etc. R. Co., 45 Iowa, 497; Nelson v. Great Northern R. Co., 52 Minn. 276; 53 N. W. 1129; Kansas, etc. R. Co. v. Wiggins, 24 Kans. 588; Kansas, etc. R. Co. v. Wood, Id. 619; Pacific R. Co. v. Brown, 14 Id. 469). The fact that the owner of oxen which had strayed away, abandoned pursuit of them at night, knowing that trains frequently passed, does not constitute contributory negligence (Louisville, etc. R. Co. v. Williams, 105 Ala. 379; 16 So. 795).

¹ Willful exposure of cattle to such injuries is a defense; because that gives consent thereto (Dolan v. Newburgh, etc. R. Co., 120 N. Y. 571; 24 N. E. 824; Fort Wayne, etc. R. Co. v. Woodward, 112 Ind. 118; 13 N. E.

260; approved in Heller v. Abbot, 79 Wisc. 409; 48 N. W. 598; conceded in Corwin v. N. Y. & Erie R. Co., 13 N. Y. 42; Shepard v. Buffalo, etc. R. Co., 35 Id. 641, 645.) But turning cattle loose on the owner's farm, next to an unfenced railroad, is not such willful exposure (Id.). Where a man borrowed a horse and got drunk and rode it upon a railroad, the owner was not allowed to recover on the ground of neglect to fence; the court saying: "If an owner rides his horse upon a railroad track, he must . . . be deemed to have voluntarily exposed it to destruction

. . . The legislature cannot be presumed to have intended that one who abandons his property shall nevertheless recover its value" (Welty v. Indianapolis, etc., R. Co., 105 Ind. 55; see Jeffersonville, etc. R. Co. v. Dunlap, 29 Id. 426). The statute does not include injuries to a horse driven by the owner on the track on a dark night, while traveling along a highway (Case v. N. Y. Central R. Co., 75 Hun, 527; 27 N. Y. Supp. 496). Plaintiff had turned the cow into the highway to go to the pasture across the track, intending to follow her soon, before any train of which he had any knowledge should come along; and while thus loose the cow got upon the highway crossing and was killed. Held, for the jury (not the court) to say whether, under all the circumstances, plaintiff was guilty of contributory negligence (Courson v. Chicago, etc. R. Co., 71 Iowa, 28; 32 N. W. 8). The turning of a colt

there, willfully refrains from any effort to remove them,² to recover for injuries suffered by them. Neither do they affect the rule that one cannot recover for the omission of an act which he has prevented. Thus, if the owner of adjoining land has refused to permit the company to erect fences bordering on his land, this is a good defense for the company as to him, his grantee, or tenant, against any claim founded upon such defect of fence.³

§ 453. Rule in Illinois, etc.—The peculiar statutes and local ordinances of Illinois, Missouri, Wisconsin and Kansas, combined with the exceptional rule of contributory negligence, which was until recently enforced in Illinois, have led to so many refined distinctions in their decisions that we must leave the precise rule in these states to be settled by local authorities.¹

§ 454. Rule in Maryland and Georgia.—Under the fencing laws of Maryland and Georgia, it is held that railroad companies are not absolutely liable for animals straying upon their

upon the highway for the purpose of taking it across the railroad track to a pasture, held not be a willful act (*Smith v. Kansas City, etc. R. Co.*, 58 Iowa, 622).

² *Moody v. Minneapolis, etc. R. Co.*, 77 Iowa, 29; 41 N. W. 477.

³ *Tombs v. Rochester, etc. R. Co.*, 18 Barb. 583; *Hurd v. Rutland, etc. R. Co.*, 25 Vt. 116.

¹ In Illinois, where plaintiff turned his horse out upon the commons, and he passed over other lands on to the track, this was held to be such an unlawful act that he could not recover (*Peoria, etc. R. Co. v. Champ*, 75 Ill. 577). But it is not sufficient to charge the owner of cattle with contributory negligence, to show that he permitted them to run at large in violation of the stock-law. It must appear that the probable consequence of his doing so would be that they would go upon the track and be injured (*Cairo, etc. R. Co. v. Woolsey*,

85 Ill. 370; *Ewing v. Chicago, etc. R. Co.*, 72 Id. 25; *Cairo, etc. R. Co. v. Murray*, 82 Id. 76). For Kansas cases, in which plaintiff was held precluded by his negligence, see *Central Branch R. Co. v. Lea*, 20 Kans. 353 [cattle running loose]. Especially if the owner turns them into an unfenced field, adjoining the road (*Kansas Pacific R. Co. v. Landis*, 24 Id. 406); though he can recover, even in the latter case, if he owns the fee, and the company has only an easement in the land covered by its right of way (*Atchison, etc. R. Co. v. Riggs*, 31 Id. 622). See further *Mo. Pacific R. Co. v. Wilson*, 28 Id. 637; *Prickett v. Atchison, etc. R. Co.*, 33 Id. 748; *Atchison, etc. R. Co. v. Shaft*, 33 Id. 521. Compare *Atchison, etc. R. Co. v. Gabbert*, 34 Id. 132. For Missouri cases, see *Windsor v. Hannibal, etc. R. Co.*, 45 Mo. App. 123; *Patton v. West End, etc. R. Co.*, 14 Id. 589.

roads through want of fences, but that the only effect of the statute is to raise a presumption of negligence against them, if they are not fenced; and the owner of an animal cannot, in those states, recover for injuries to it, if the railroad company disproves negligence on its own part, or proves contributory negligence on his.¹

§ 455. **Degree of care in maintaining fence.** — Where the fences and guards required by law are maintained by a railroad company, its *absolute* liability under the statutes of fences ceases; and it thenceforward owes to cattle only such duties as every occupier of land owes.¹ If a fence or cattle-guard is so covered by snow or earth as to enable animals to pass over it, the company is liable upon proof of its negligence in leaving the fence in that state,² but not otherwise,³ nor even then, if the plaintiff's fault contributed to the injury in the manner heretofore defined.⁴ A railroad company is only required to

¹ See *Keech v. Baltimore, etc. R. Co.*, 17 Md. 32; *Baltimore, etc. R. Co. v. Lamborn*, 12 Id. 257; *Macon, etc. R. Co. v. Davis*, 13 Ga. 68.

² *Hance v. Cayuga, etc. R. Co.*, 26 N. Y. 428; *Chicago, etc. R. Co. v. Cauffman*, 28 Ill. 513; *Toledo, etc. R. Co. v. Thomas*, 18 Ind. 215; *Northern Indiana R. Co. v. Martin*, 10 Id. 460.

³ A railroad company is bound at all times to keep its cattle-guards open and unobstructed; and if it permits them to remain filled with snow, so that cattle on the highway, without any negligence on the part of the owner, pass over them to the track, and are injured by its cars, it is guilty of negligence, and liable for the damage (*Dunnigan v. Chicago, etc. R. Co.*, 18 Wisc. 28). *S. P.*, *Grahman v. Chicago, etc. R. Co.*, 78 Iowa, 564; 43 N. W. 529; *Robinson v. Chicago, etc. R. Co.*, 79 Iowa, 495; 44 N. W. 718; *Giger v. Chicago, etc. R. Co.*, 80 Iowa, 492; 45 N. W. 906.

⁴ So, where sufficient cattle-guards were maintained, but they were filled up with fresh snow, which

could not, with ordinary diligence be removed (*Stacey v. Winona, etc. R. Co.*, 42 Minn. 158; 43 N. W. 905; *Wait v. Bennington, etc. R. Co.*, 61 Vt. 268; 17 Atl. 284; *Chicago, etc. R. Co. v. Kennedy*, 22 Ill. App. 308; *Patten v. Chicago, etc. R. Co.*, 75 Iowa, 459; 39 N. W. 708).

⁴ *Hance v. Cayuga, etc. R. Co.*, 26 N. Y. 428. In that case, defendant had erected proper fences and guards, but they were filled up with snow, which defendant was not sufficiently diligent in removing. The plaintiffs' cow passed over a cattle-guard, and was killed by a passing train. The plaintiffs having been in fault in allowing the cow to escape from their yard, held, that they could not recover. *Balcom, J.*, who delivered the opinion of the court, thought, however, that "if the plaintiffs had been properly driving the cow along the highway, and she had walked over or through the cattle-guard on to the railroad track by reason of the omission of the defendant to remove the snow," they

use reasonable diligence to keep its gates repaired and closed;⁵ and it is not liable for an injury to animals, occasioned by their getting upon the track through a gate left open without the fault of the company, at a part of the road properly fenced and guarded, although another portion of the road is not fenced.⁶ When a railroad company maintains proper fences and gates, an adjoining proprietor is liable to third persons for any injury to their animals, resulting from his fault in leaving open a gate upon the track.⁷ If the company opens a private way for the accommodation of an adjacent owner, or permits him to open it,⁸ he and his tenants must keep up the bars and gates, at their own risk.⁹ But if they fail to do so, the occupier of *other* land may, nevertheless, recover from the com-

would have been entitled to recover. As to the distinction between the liability of a company for injuries resulting from a failure to fence the road in the first instance, and the liability resulting from failure to repair, see *Antisdel v. Chicago*, etc. R. Co., 26 Wisc. 145.

⁵ So held as to closing gates. *Spinner v. N. Y. Central R. Co.*, 67 N. Y. 153, 157; *Illinois Central R. Co. v. McKee*, 43 Ill. 119; *Illinois Central R. Co. v. Dickerson*, 27 Ill. 55; see *Poler v. N. Y. Central R. Co.*, 16 N. Y. 476. If such diligence is not used, the company is liable. (*Wait v. Burlington*, etc. R. Co., 74 Iowa 207; 37 N. W. 159; *Manwell v. Burlington*, etc. R. Co., 89 Iowa, 708; 57 N. W. 441; *Chisholm v. Northern Pac. R. Co.*, 53 Minn. 122; 54 N. W. 1061; *Nicholson v. Atchison*, etc. R. Co. 55 Mo. App. 593). And so, if the gates are not kept in repair (*Fremont*, etc. R. Co. v. *Pounder*, 36 Neb. 247; 54 N. W. 509; *Johnson v. Chicago*, etc. R. Co. 55 Iowa 707). But in either case, the burden of proof is upon the plaintiff to show that it was open by reason of defendant's fault (*Id.*). Such proof is sufficiently given, by showing that

the defect was caused by any persons employed by defendant whether by the day or piece contract (*Jacksonville*, etc. R. Co. v. *Prior*, 34 Fla. 271; 15 So. 760).

⁶ *Brooks v. N. Y. & Erie R. Co.*, 13 Barb. 594.

⁷ *Russell v. Hanley*, 20 Iowa, 219.

⁸ *Louisville*, etc. R. Co. v. *Goodbar*, 102 Ind. 596; *Evansville*, etc. R. Co. v. *Mosier*, 101 Id. 597; *Bond v. Evansville*, etc. R. Co., 100 Id. 301.

⁹ *Indianapolis*, etc. R. Co. v. *Shimer*, 17 Ind. 295; *Box v. Atchison*, etc. R. Co., 58 Mo. App. 359. Where the plaintiff built and maintained the fences of a lane which extended from a highway across the railroad to his house, and had a gate at each end, and there were cattle-guards on each side of it on the track, the court said: "While the plaintiff was maintaining the fences and gates, apparently for the purpose of enjoying an open crossing, we think the company was justified in assuming that he preferred an open crossing. It was not for him to complain, therefore, that his cow strayed upon the track" (*Tyson v. Keokuk*, etc. R. Co., 43 Iowa, 207).

pany for cattle wandering through the unfenced land, and so straying upon the railroad;¹⁰ for it is the duty of the company to maintain the fence, and it cannot evade that duty by delegating it to some one else. Under the Iowa statute, however, which requires a company, if so requested by an owner of land on both sides of the road, to provide an "adequate means of crossing" its road, if the company has provided such a crossing and supplied the necessary gates and bars, it is not liable for any injury sustained by a third party, which is caused by the negligence of him for whose benefit the crossing is provided.¹¹

§ 456. Company's action against owner.—If, through the negligence of the owner of domestic animals, in a state where the English rule prevails, they trespass on a railroad and come into collision with a train, without contributory negligence on the part of the company, he is liable to the company for the resulting damages.¹ But if the law required the road to be fenced, and it was not, the company cannot recover; for that is at least contributory negligence.²

¹⁰The contrary was ruled in *Indianapolis, etc. R. Co. v. Adkins* 23 Ind. 340. But the doctrine of this case was doubted in *Cincinnati, etc. R. Co. v. Ridge*, 54 Ind. 39; and in effect was overruled in *Indianapolis, etc. R. Co. v. Thomas*, 84 Id. 194. This is certainly the rule where the plaintiff has not been negligent (*Baltimore, etc. R. Co. v. Kreiger*, 90 Ind. 380). For the convenience of one Pettit, who owned on both sides of the railroad, gates were built as part of the fences. Plaintiff's mules were pastured on the adjacent farm of one Craft, over which plaintiff had no control; by reason of the bad fence between the two farms the mules passed on to the

farm of Pettit, thence through the open gates, and were killed. The company was held liable (*Wabash, etc. R. Co. v. Williamson*, 104 Ind. 154).

¹¹*Henderson v. Chicago, etc. R. Co.*, 39 Iowa, 220; s. c., 43 Id. 620.

¹*Annapolis, etc. R. Co. v. Baldwin*, 60 Md. 88; *Housatonic R. Co. v. Knowles*, 30 Conn. 313; *Hannibal, etc. R. Co. v. Kenney*, 41 Mo. 271; see *N. Y. & Erie R. Co. v. Skinner*, 19 Pa. St. 298. Compare *Mobile, etc. R. Co. v. Hudson*, 50 Miss. 572; *Richmond v. Sacramento, etc. R. Co.*, 18 Cal. 351.

²*Louisville, etc. R. Co. v. Simmons*, 85 Ky. 151; 3 S. W. 10.

CHAPTER XXI.

RAILROAD INJURIES TO PERSONS.

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| <p>§ 457. Care required to avoid injury to persons.</p> <p>458. Illustrations of want of care.</p> <p>459. Negligence of other persons or companies.</p> <p>460. Rate of speed.</p> <p>461. Care required of railroads on and near highways.</p> <p>462. [Transferred to § 485<i>a</i>].</p> <p>463. Care required at highway-crossings.</p> <p>464. Care required at other crossings.</p> <p>464<i>a</i>. Intersecting railroads.</p> <p>465. Care of stationary cars and engines.</p> <p>466. Gates, flagmen and watchmen.</p> <p>466<i>a</i>. Duty to maintain fences.</p> <p>467. Neglect of statutory precautions.</p> <p>468. Omission to ring or whistle at crossings.</p> <p>469. Presumptions in such cases.</p> <p>470. Who entitled to benefit of statutes.</p> <p>471. Trains running backwards.</p> <p>472. Contributory negligence.</p> | <p>§ 473. What is not contributory negligence.</p> <p>474. Fractionous horse.</p> <p>475. Crossing track in view of train.</p> <p>476. Duty to look and listen.</p> <p>477. When failure to look and listen excused.</p> <p>478. Obstructions to view.</p> <p>479. Crossing when highway is blocked.</p> <p>480. Traveling along the track.</p> <p>481. Infirm persons.</p> <p>481<i>a</i>. Children.</p> <p>481<i>b</i>. Deceased persons.</p> <p>482. Effect of contributory negligence on statutory liabilities.</p> <p>483. Duty to avoid effects of contributory negligence.</p> <p>484. Duty to anticipate contributory negligence.</p> <p>485. Evidence of negligence.</p> <p>485<i>a</i>. Street cars.</p> <p>485<i>b</i>. Electric and cable cars.</p> <p>485<i>c</i>. Street cars; contributory negligence.</p> |
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§ 457. Care required to avoid injury to persons.—A railroad company is bound to use ordinary care to avoid injury to persons upon or near the track which it uses, whether it owns the track or not.¹ It is not bound to use more than ordinary

¹ Webb v. Portland, etc. R. Co., 38 Pac. 957. Compare *Quested v. Newburyport, etc. R. Co.* 127 Mass. 204; and see § 444 *ante*; § 459, *post*. A charge requiring "ordinary care" is always proper (*Pope v. Kansas City Southern Pac. R. Co.*, 105 Cal. 379; *R. Co.*, 99 Mo. 400; 12 S. W. 891).

care for this purpose,² but ordinary care, with reference to the management of a railroad, must not be understood as meaning no higher degree of care than such as would be required from the driver of a stage-coach.³ The manager of a railroad must use that degree of care to avoid injury to strangers, which the majority of prudent and careful men would use in a similar situation, to protect themselves against similar risks.⁴ And since human life is always more or less endangered by the speed at which trains necessarily run and by other peculiarities of railroad traffic, it is the duty of railroad managers to take such precautions against danger as are reasonably proportioned to the magnitude of the peril. The ordinary care to be used in the management of a railroad, therefore, may, and frequently does, require the use of precautions which, in any business involving less risk, would be required only from one bound to use a high degree of care.⁵ But it is erroneous to charge a jury

² *Flynn v. Central R. Co.*, 142 N. Y. 439; 37 N. E. 514 [licensee]; *Chicago, etc. R. Co. v. Caulfield*, 63 Fed. 396; 11 C. C. A. 552 [footpath crossings]; *Coy v. Utica, etc. R. Co.*, 23 Barb. 643, 651; *Cleveland, etc. R. Co. v. Terry*, 8 Ohio St. 570; *Pendleton St. R. Co. v. Shires*, 18 Id. 255; *Baltimore, etc. R. Co. v. Bahrs*, 28 Md. 647. As to the care which should be taken to prevent the explosion of a locomotive, see *Chicago, etc. R. Co. v. Shannon*, 43 Ill. 339. It is correct to charge that a car driver "can be justly charged with negligence only when he fails to observe or do something he ought to have seen or done, and would have noticed or done, with ordinary vigilance; when he fails to be prepared for something visible, or at least of probable occurrence, or that might be reasonably expected to happen" (*Barnes v. Shreveport R. Co.*, 47 La. Ann. 1218; 17 So. 782). In Alabama, a high degree of care is required and described by statute (Code, 1886, par. 1144; see *Mobile, etc. R. Co. v. Malone*, 46 Ala. 391; *Nashville, etc. R.*

Co. v. Comans, 45 Id. 437). In Massachusetts, in certain cases, a less degree of care is required by a statute (Pub. St. ch. 112, § 212) giving a right of action against a railroad company where the life of a passenger or of a person not a passenger or in the employ of a company is lost by "the unfitness or gross negligence or carelessness of its servant or agents while engaged in its business" (See *Chisholm v. Old Colony R. Co.*, 159 Mass. 3; 33 N. E. 927).

³ *Johnson v. Hudson River R. Co.*, 6 Duer, 633; *aff'd*, 20 N. Y. 65; disapproving, on this point, *Brand v. Schenectady, etc. R. Co.*, 8 Barb. 368.

⁴ *Alabama, etc. R. Co. v. McAlpin*, 75 Ala. 113; *Louisville, etc. R. Co. v. McCoy*, 81 Ky. 403; and other cases cited under § 47, *ante*.

⁵ *Weber v. N. Y. Central R. Co.*, 58 N. Y. 451, 462. A railroad company operating its trains on city streets must use greater care than in less frequented localities, and any neglect of any precautions proper in the peculiar circumstances of the

that "the utmost care" or even "great care" must be used in the management of a railroad, with reference to others than passengers.⁶

§ 458. Illustrations of want of care.—The duties which railroad companies owe to persons who for any reason are lawfully upon or near their tracks, have been illustrated in practical experience in many different ways. Thus, a railroad company is responsible to persons lawfully standing upon a platform of one of its stations, for injuries caused by throwing any heavy thing from a car without warning,¹ or by the projection of anything from a car over the edge of the platform.²

locality constitutes negligence (*Norfolk, etc. R. Co. v. Burge*, 84 Va. 63; 4 S. E. 21). A railway company is negligent if it fails to adopt the most approved modes of construction and machinery in known use in the business, and the best precautions in known practical use for securing safety (*Manson v. Manhattan R. Co.*, 55 N. Y. Super. Ct. 18).

⁶ "The utmost care," held fatal error (*Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1; *Weber v. N. Y. Central R. Co.*, 58 N. Y. 451). The contrary ruling in *Johnson v. Hudson River R. Co.* (20 N. Y. 65), can only be sustained upon the theory that the charge, although technically erroneous in using the words "utmost care," did not, under the circumstances, mislead the jury (*Weber v. N. Y. Central R. Co.*, 58 N. Y. 451). A charge that the company, in running trains at night, across a highway, "was bound to use all the means and measures of precaution which the highest prudence could suggest, and which it was in its power to employ," is erroneous (*Id.*). A charge that the company was bound to use "a full measure of care and diligence, all that could be expected," is erroneous, as amounting to the requirement of extraordinary care (*West-*

ern, etc. R. Co. v. King, 70 Ga. 261). An instruction that a railway company must use great care in operating its trains at streets and public crossings, and to discover persons thereon, and to avoid damage to their persons and property, states a greater degree of care than is required by law (*Gulf, etc. R. Co. v. Smith*, 87 Tex. 348; 28 S. W. 520). So as to "unusual care" and "extraordinary diligence" (*Sabine, etc. R. Co. v. Hanks*, 2 Tex. Civ. App. 306; 21 S. W. 947). It is error to require a railroad company in approaching a crossing to exercise "a high degree of diligence and care," and "give sufficient and timely warning, and take such precautions as shall be efficient" (*Chicago, etc. R. Co. v. Fisher*, 49 Kans. 460; 30 Pac. 462).

¹ *Toledo, etc. R. Co. v. Maine*, 67 Ill. 298 [timber]. *S. P.*, *Savannah, etc. R. Co. v. Slater*, 92 Ga. 391; 17 S. E. 350 [plaintiff standing near track; stick thrown]; *Atchison, etc. R. Co. v. Johns*, 36 Kans. 769; 14 Pac. 237 [pushing trunk on icy station platform against plaintiff].

² So held, where timber projected from freight car (*Hicks v. Pacific R. Co.*, 64 Mo. 430). Plaintiff, standing out of danger from all ordinary trains, was struck by the side-brake

So the company was held responsible for an injury to one standing or passing near a track, caused by a jet of steam or hot water negligently issued from the engine.³ It is presumptively negligent to set even a single car in motion, without a brakeman thereon, in a position to enable him to perceive danger,⁴ much more to run several cars with no brakeman,⁵ or to allow detached cars to run on a descending grade, without enough brakemen to control them,⁶ or without any signals or person to look out,⁷ or not to supply any train with a sufficient number of brakes to stop it within a reasonable time or distance; or for the man in charge of the brakes to fail to apply them, when the proper signal is given.⁸ It is some evidence of negligence that an engine or train is placed in charge of an incompetent person.⁹ It is the duty of the lookout man on an engine to keep a watch for objects in front of it; and it is very culpable negligence for a lookout to fail to see a person on the

of a construction train. Held, that he could recover (*Sullivan v. Vicksburg, etc. R. Co.*, 37 La. Ann. 800; 2 So. 586). The sides of the cars projected over the station platform three or four inches, swept the platform and struck plaintiff on the side. Held, enough to sustain a verdict for plaintiff (*Archer v. N. Y., New Haven, etc. R. Co.*, 106 N. Y. 589; 13 N. E. 318). *s. p.*, *Dobiecki v. Sharp*, 88 N. Y. 203.

³ *Stamm v. Southern R. Co.*, 1 Abb. N. C. 438. Whether a company should warn persons of danger on passing crossing, when a locomotive near by is emitting steam, is for the jury (*Lewis v. Eastern R. Co.*, 60 N. H. 187).

⁴ *Noonan v. N. Y. Central R. Co.*, 131 N. Y. 594; 30 N. E. 67. It is generally culpable negligence to let a car run down hill, without any brakeman (*Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269). Putting a car in motion on a track where it is known that men may be, without any person being on the car, and without any means of stopping it, is

evidence tending to prove negligence, although there is no public crossing at the place (*Lake Shore, etc. R. Co. v. Hundt*, 140 Ill. 525; 30 N. E. 458). To same effect, *Phillips v. Milwaukee, etc. R. Co.*, 77 Wisc. 349; 46 N. W. 543 [switching cars in yard].

⁵ *Toledo, etc. R. Co. v. McGinnis*, 71 Ill. 346. A jury is warranted in finding a railroad company negligent in failing to place a brakeman on the cars when making a flying switch in its private yard, frequently used, with its consent, by persons having business with it (*Reifsnyder v. Chicago, etc. R. Co.*, 90 Iowa, 76; 57 N. W. 692).

⁶ *Baker v. Kansas City, etc. R. Co.*, 122 Mo. 533; 26 S. W. 20.

⁷ *Conley v. Cincinnati, etc. R. Co.*, 89 Ky. 402; 12 S. W. 764.

⁸ *Forbes v. Atlantic, etc. R. Co.*, 76 N. C. 454.

⁹ The fact that an engine was running under the charge of a fireman only, is some evidence of negligence (*O'Mara v. Hudson River R. Co.*, 38 N. Y. 445).

track who is plainly visible;¹⁰ though it is not negligence to run a train at night, when, by rain or other natural causes, the lookout cannot see anything in front of him.¹¹ It is usually evidence of negligence for the engineer to refuse to stop a train when he sees a person, on or near the track, giving signals of alarm, and plainly endeavoring to stop the train. Where railroads are carefully built, and as carefully excluded from contact with highways as they are in England, an engineer might be in some cases justified in believing that a stranger, thus giving signals of alarm, was an irresponsible person, who need not be noticed; but in America, generally, where few railroads are thus constructed, and where the danger of travel is therefore greatly increased, the presumption of the duty of the engineer to slacken speed under such circumstances is very strong; and his refusal to do so has been held,¹² and probably always would be held, gross negligence, if the event proved that the alarm was well founded. If any person persists in remaining upon the track, in the direct path of the train, it is the absolute duty of the engineer to stop.¹³

§ 459. Negligence of other persons or companies.—A railroad company is responsible, not only for the negligence of its servants, but also for such habitual carelessness of others, as it knows and permits to be practiced upon its trains and premises; *e. g.*, for the habitual carelessness of a postal clerk, in handling mail bags.¹ Railroad companies have no power

¹⁰ *East Tennessee, etc. R. Co. v. White*, 5 Lea, 540. The engineer discovered plaintiff when a half mile away, but supposed the object seen was a pig on the track. He did not slacken speed until it was too late to stop the train after discovering the object to be a child. The railroad company was held liable (*Keyser v. Chicago, etc. R. Co.*, 66 Mich. 390; 33 N. W. 867).

¹¹ *Louisville, etc. R. Co. v. Melton*, 2 Lea, 262. The Tennessee statute requires that a person should accompany each locomotive, as a lookout (Code, 1884, par. 1298). See § 463, *post*.

¹² *Memphis, etc. R. Co. v. Sanders*, 43 Ark. 225. See *Barley v. Chicago, etc. R. Co.*, 4 Biss. 430.

¹³ *Bouwmeester v. Grand Rapids, etc. R. Co.*, 63 Mich. 557; 30 N. W. 337.

¹ Plaintiff having purchased a ticket, went out on the platform to wait for an approaching train. As the postal car passed, the postal clerk threw a mail bag, which injured the plaintiff. The company was held liable, because this method of discharging mail bags had prevailed for a long time, and the company was chargeable with notice of it (*Carpenter v. Boston, etc. R. Co.*, 97 N.

to lease their roads or to delegate their public duties, without express statutory authority;² and therefore a company which attempts to do so remains liable for injuries suffered through the negligence of any one operating any part of its road, with its consent.³ Even when such a lease is authorized, it does not always follow that the lessor will escape this responsibility. That will depend upon the terms of the statute and the lease. A mere permission to lease does not have this effect.⁴ But if the permissive statute contemplates a transfer of responsibility from the lessor to the lessee, as seems to be generally the case, the lessor is not compelled to remain liable for the negligence of the lessee.⁵ A company running its trains over the road of another company is bound by the same laws and ordinances as bind the latter, so far as liability for negligence is concerned.⁶ If such train is under the exclusive control of servants of the company owning the track, the latter is liable for the damages caused by its negligent management; if the servants of both jointly control the train, both companies are liable.⁷ A company is liable for an injury caused by its own

Y. 494; rev'g 24 Hun, 104). A company, permitting the servants of another company to control its trains, adopts such servants as its own (*Union R. etc. Co. v. Kallaher*, 114 Ill. 325). As to liability for disorderly persons, see *Illinois Central R. Co. v. Grabill*, 50 Ill. 241.

² *Abbott v. Johnstown, etc. R. Co.*, 80 N. Y. 27. See § 120*a*, *ante*.

³ *Id.*; *Illinois Central R. Co. v. Barron*, 5 Wall. 90; *Alexandria, etc. R. Co. v. Brown*, 17 Id. 445; *Nelson v. Vermont, etc. R. Co.*, 26 Vt. 717; *Mahoney v. Atlantic, etc. R. Co.*, 63 Me. 68; *Daniels v. Hart*, 118 Mass. 543; *Ohio, etc. R. Co. v. Dunbar*, 20 Ill. 623; *Aycock v. Raleigh, etc. R. Co.*, 89 N. C. 321; *Macon, etc. R. Co. v. Mayes*, 49 Ga. 355.

⁴ The ground of liability of the lessor company, for acts of lessee, is not merely that lessee is agent of lessor, but that lessor, in consideration of grant of its charter, undertook the performance of duties and

obligations towards the public, and public policy requires that it should not be relieved therefrom without legislative consent (*Balsley v. St. Louis, etc. R. Co.*, 119 Ill. 68; 8 N. E. 859). Mere consent to lease is not an exemption. See *Abbott v. Johnstown, etc. R. Co.*, 80 N. Y. 27; *Washer v. Delaware, etc. Canal Co.*, Id. 212.

⁵ *Mahoney v. Atlantic, etc. R. Co.*, 63 Me. 68; *Philadelphia, etc. R. Co. v. Anderson*, 94 Pa. St. 351; *Quested v. Newburyport, etc. R. Co.*, 127 Mass. 204.

⁶ *McGrath v. N. Y. Central R. Co.*, 63 N. Y. 522; *Great Western R. Co. v. Blake*, 7 Hurlst. & N. 987; *Thomas v. Rhymney R. Co.*, L. R. 6 Q. B. 266; *Wright v. Midland R. Co.*, L. R. 8 Ex. 137; *Buxton v. North-eastern R. Co.*, L. R. 3 Q. B. 549; *Birkett v. Whitehaven, etc. R. Co.*, 4 Hurlst. & N. 730.

⁷ *Nashville, etc. R. Co. v. Carroll*, 6 Heisk. 347.

negligence to another company, while the latter is running trains on its road under contract, and is also so liable for an injury to the passengers and servants of such company.⁸ Where two companies are in joint occupation of the same depot-grounds, so that their respective servants must necessarily pass over each other's tracks, each company owes the same care to the servants of the other as to its own.⁹ When a company owns or operates a railroad at the time of the injury, there is a presumption that such company also owned or controlled the train which did the injury.¹⁰ Where a railroad company is compelled by statute to forward over its line through traffic from other lines, it is bound to use only ordinary care to ascertain that the trucks of other companies are in a condition to travel safely, and is not bound to unload them for the purpose of a rigidly minute inspection.¹¹ It is not negligence for a company to transport over its road the cars of other roads not constructed with the most approved appliances;¹² and, before so transporting such cars, it is not bound to repeat the tests which should be used in the original construction of such cars, but may generally assume that they are in good condition, if they appear to be so.¹³ It is, how-

⁸ Matter of Merrill, 54 Vt. 200.

⁹ Illinois Central R. Co. v. Frelka, 110 Ill. 498.

¹⁰ Where the injury is proved to have been caused by an engine and car while being operated on defendant's track, it is unnecessary to prove the ownership of such engine and car, or that the persons operating them were defendant's employees (Lake Erie, etc. R. Co. v. Carson, 4 Ind. App. 185; 30 N. E. 432).

¹¹ In Richardson v. Great Eastern R. Co. (L. R. 1 C. P. Div. 342; rev'g L. R., 10 C. P. 486) plaintiff was injured by means of the breaking of an axle of a coal truck, not belonging to defendant, while being carried over its line. It had been inspected, but an old crack in the fore axle was not discovered; the company was held not to be negligent. Jessel, M. R., said: "All these usual pre-

cautions were adopted here, and two defects were discovered. . . . The real question was, whether the company was guilty of negligence in not making a more minute examination. . . . The company cannot stop all foreign trucks and empty them for the purposes of a minute examination. . . . If the defects discovered were such as ought reasonably to induce a person of experience to think that some other defect existed, or was likely to exist, then there would be a duty to examine further; but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made."

¹² Baldwin v. Chicago, etc. R. Co. 50 Iowa, 680.

¹³ Ballou v. Chicago, etc. R. Co., 54 Wisc. 257.

ever, bound to inspect such cars superficially in the same manner as its own, and is responsible for the consequences of such defects as would have been disclosed by ordinary inspection; for it is its duty to have such defects repaired or refuse to take the cars.¹⁴

§ 460. Rate of speed.—Frequent attempts have been made to convict railroad companies of negligence, on the mere ground of the speed at which their trains have been run. But it never has been, and never ought to be, established as a rule of law that any conceivable rate of speed, within the company's exclusive premises and where strangers are not invited to enter, is *per se* evidence of negligence.¹ The whole object of the railroad system is to attain a high speed of travel; and the vast saving of time which the community makes by every

¹⁴ Defendant's road was so arranged that both broad and standard gauge cars could be run upon the same train, and two cars belonging to two other companies and of different gauges were being transported at the time of the accident. Held, that where trains are so made up of cars of different gauge, that the draw-heads of the couplings are more apt to pass each other, it is more important that the bumpers should be carefully inspected for the protection of the couplers; and that, as the defect was an obvious one and easily remedied, the company was liable (*Gottlieb v. N. Y., Lake Erie, etc. R. Co.*, 100 N. Y. 462; 3 N. E. 344). In a similar case, the company was held liable to its servants for an injury caused by a novel coupling appliance of the foreign car, which allowed the draw-heads to interlap (*O'Neil v. St. Louis, etc. R. Co.*, 9 Fed. 337).

¹ In the operation of a railway train outside of towns and villages, no rate of speed, however great, is alone sufficient evidence to establish negligence (*Omaha, etc. R. Co. v.*

Krayenbuhl, 48 Neb. 553; 67 N. W. 447; *N. Y., Phil., etc. R. Co. v. Kel-lam*, 83 Va. 851; 3 S. E. 703; *McDonald v. International, etc. R. Co.*, 86 Tex. 1; 22 S. W. 939; *Farve v. Louisville, etc. R. Co.*, 42 Fed. 441. See *Sharrod v. Northwestern R. Co.*, 4 Exch. 580; *Warner v. N. Y. Central R. Co.*, 44 N. Y. 465; *Maginnis v. N. Y. Central R. Co.*, 52 Id. 215, 220; *Wallace v. St. Louis, etc. R. Co.*, 74 Mo. 594; *Young v. Hannibal, etc. R. Co.*, 79 Id. 336; *Powell v. Mo. Pacific R. Co.*, 76 Id. 80; *McKonkey v. Chicago, etc. R. Co.*, 40 Iowa, 205; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66). The reasonable rule is that the highest rate of speed consistent with the safety of the passengers is proper and legitimate (*Houston v. Vicksburg, etc. R. Co.*, 39 La. Ann. 796; 2 So. 562). To charge the jury "that if they believe from the evidence the defendant, at the time of the killing, was running a train which could not possibly be stopped within half a mile, this of itself was negligence,"—Held, error (*Doggett v. Richmond, etc. R. Co.*, 81 N. C. 459).

increase in the rapidity of travel, with the corresponding increase in the productive power of the community, should make courts and juries cautious, lest they hinder the progress of the world by an unwise timidity. If the track is decayed or loosely laid (as is too often the case in America), or if it is not fenced in, where necessary, a high speed is, no doubt, often dangerous. There are many railroads upon which it would be more dangerous to travel thirty miles in an hour than to move at double the speed upon a well-built and equipped road. The proper test, therefore, with respect to the speed at which a train was run, is to inquire whether the condition of the track and equipment, the protection afforded to travelers by fencing the track from adjoining highways, or suitable warnings against danger, and similar circumstances, were such as to make that speed consistent with prudence. The contrary should not be presumed. Where the road passes through a populous district, without being closely fenced in, or for any other reason persons are likely to be near the track, the speed of trains should obviously be diminished in proportion to the liability of meeting persons on the track.² Statutes and

² *Grippen v. N. Y. Central R. Co.*, 40 N. Y. 34, 48; *Lafayette, etc. R. Co. v. Adams*, 26 Ind. 76; *Meyer v. Midland, etc. R. Co.*, 2 Neb. 319; *Chicago, etc. R. Co. v. Spilker*, 134 Ind. 380; 33 N. E. 280; 34 Id. 218; *Becke v. Missouri Pac. R. Co.*, 102 Mo. 544; 13 S. W. 1053. While, in the absence of an ordinance limiting speed, a railroad company may run its trains through a village at any rate of speed consistent with the safety of its trains and passengers and of persons rightfully upon its right of way at road crossings (*Partlow v. Illinois Cent. R. Co.*, 150 Ill. 321; 37 N. E. 663), yet, even in the absence of regulation, a railroad company has no right to run its trains through a populous city, even in places where the general public has no right to be, at any rate of speed, but such rate of speed must be regulated by due regard for safety of the public (*Chicago etc. R. Co. v. Dunleavy*, 129 Ill. 132; 23 N. E. 15). But it is not negligence to run a freight train through a village of 200 inhabitants at 20 miles per hour, where it is not shown that the train was improperly equipped with brakes and brakemen (*Johnson v. Chesapeake, etc. R. Co.*, 91 Va. 171; 21 S. E. 238). It is negligence, in running trains through a city to a fair ground in the suburbs, where large numbers of people congregate around the station, to use an inferior locomotive, run by a fireman instead of a skilled engineer, and to run its trains at a dangerous speed in approaching the station (*Peyton v. Texas, etc. R. Co.*, 41 La. Ann. 861; 6 So. 690). Running a train at a high rate of speed, at an unusual hour, and without warning, past a train standing at a platform discharging its passen-

ordinances are not the sole measure of prudence in such cases.³ The rules governing the rate of speed on or near highways and at crossings of public or private ways, or other railroads, are stated in sections 461, 463 464 and 464a. Still more is a high rate of speed improper when the train is passing through station grounds, where passengers, whether over the railroad to which that train belongs⁴ or over any other,⁵ are accustomed to enter upon the same grade. And in all cases, the rate of speed is a fact to be considered, with reference to the degree and kind of care to be used, as a matter of prudence in view of the speed.⁶

§ 461. Care required of railroads on and near highways.—

In America, from motives of economy, railroads are almost universally constructed upon the same grade with the neighboring highways, and frequently run for short distances closely parallel to highways and even directly along their center. The result is that travelers upon such highways are continually obliged to cross the tracks, and frequently obliged to travel beside, or even upon the rails. Where this is the case, it is obvious that the obligation to use ordinary care requires that

gers, who, to reach their destination, must cross the track of the moving train, is evidence of gross negligence (*Robostelli v. N. Y., New Haven, etc. R. Co.*, 33 Fed. 796). Where it is alleged that no headlight was burning, and that no whistle was sounded or bell rung, the question of speed may be material (*Thomas v. Chicago, etc. R. Co.*, 86 Mich. 496; 49 N. W. 547).

³ Where a statute prescribes a maximum speed, in a city, a less rate is not necessarily lawful (*Alabama, etc. R. Co. v. Phillips*, 70 Miss. 14; 11 So. 602). *S. P.*, *Louisville, etc. R. Co. v. French*, 69 Miss. 121; 12 So. 338. Though the Wisconsin statute limiting the speed of trains in cities and villages, does not apply to unincorporated hamlets, it is for the jury to say whether the speed of a train

crossing a street in such hamlet was, under all the circumstances of the case, negligence (*Heath v. Stewart*, 90 Wisc. 418; 63 N. W. 1051). A company may be negligent in running its train at an improper and dangerous rate of speed, at a crossing made by a public street in a populous neighborhood, though all the statutory signals be given (*Thompson v. N. Y. Central, etc. R. Co.*, 110 N. Y. 636; 17 N. E. 690).

⁴ *Parsons v. N. Y. Central R. Co.*, 113 N. Y. 355; 21 N. E. 145; *Sonier v. Boston, etc. R. Co.*, 141 Mass. 10; 6 N. E. 84; *Cincinnati, etc. R. Co. v. Butler*, 103 Ind. 31; 2 N. E. 138.

⁵ *Chicago, etc. R. Co. v. Ryan*, 62 Ill. App. 264.

⁶ *Miller v. N. Y. Central R. Co.*, 65 Hun, 623; 20 N. Y. Supp. 163; *Galveston, etc. R. Co. v. Duelm* [Tex. Civ. App.], 23 S. W. 596.

the cars should be run with much more caution than upon a road exclusively occupied by the railroad.¹ A rate of speed which elsewhere would be quite proper, is often evidence of negligence, when kept up on a highway,² especially if it is a city street.³ And when cars are thus passing along a highway *at night*, the added danger demands additional precautions, corresponding to the risk to which the lives and property of travelers are exposed; such as lights and bells,⁴ a headlight to an engine,⁵ a good lookout-man and, in storms or unusual

¹Toledo, etc. R. Co. v. Harmon, 47 Ill. 298; Illinois Central R. Co. v. Hutchinson, Id. 408; Wilson v. Cunningham, 3 Cal. 241. See also Pacific R. Co. v. Houts, 12 Kans. 328, and cases *infra*.

²St. Louis, etc. R. Co. v. Lewis, 60 Ark. 409; 30 S. W. 765. A boy 10 years old, while standing in a street, near a railroad track, waiting for a train to pass by, stepped back from the track to avoid the train, and thereby fell against a pile of ashes left in the street by the railroad company, slipped under the cars, and was killed. Held, that there was sufficient evidence of the railroad company's negligence and the boy's exercise of due care to justify submitting these issues to the jury (Chicago, etc. R. Co. v. Nelson, 153 Ill. 89; 38 N. E. 560).

³When a train running at six or seven miles an hour through a city street, ran over a child; held for the jury to say whether the train was moving too fast (Philadelphia, etc. R. Co. v. Long, 75 Pa. St. 257). To same effect, Finklestein v. N. Y. Central R. Co., 41 Hun, 34 [less than 8 miles an hour]; Chicago, etc. R. Co. v. Lee, 68 Ill. 576; Peoria, etc. R. Co. v. Miller, 11 Bradwell, 375; Loucks v. Chicago, etc. R. Co., 31 Minn. 526; 18 N. W. 651; Bolinger v. St. Paul, etc. R. Co., 36 Minn. 418; 31 N. W. 856; Pacific R. Co. v. Houts, 12 Kans. 328; Reilly v.

Hannibal, etc. R. Co., 94 Mo. 600; 7 S. W. 407. Evidence that a locomotive was run in the dark along a much frequented street, at a high and dangerous rate of speed, without headlight lighted or bell ringing, is sufficient to show wanton and willful negligence (East St. Louis, R. Co. v. O'Hara, 150 Ill. 580; 37 N. E. 917). The obligation of reasonable care to avoid accidents on railroad tracks running through cities rests on the railroad companies, though the tracks are laid on an embankment, the property of the company (McGuire v. Vicksburg, etc. R. Co., 46 La. Ann. 1543; 16 So. 457).

⁴Johnson v. Hudson River R. Co., 20 N. Y. 65; *aff'g* 6 Duer, 633. In that case, defendant's horse-car, without lights or bells, was proceeding on a dark evening upon its railroad in a city street, obstructed by a sewer in the process of construction. The plaintiff's intestate, a sober cartman, was found dead upon the track, under circumstances authorizing the inference that he had fastened his horse and was groping in the dark to find a safe passage for his team, when struck by the defendant's car. There was no witness of the accident. The company was held liable.

⁵Indianapolis, etc. R. Co. v. Galbreath, 63 Ill. 436. The Tennessee Code, 1884, par. 1298, requires com-

darkness, loud signals.⁶ To make a running or flying switch upon or across a highway is always evidence of negligence, sufficient to sustain a verdict for damages;⁷ and, if done without full warning and all suitable precautions, is negligence, as matter of law.⁸ It is sufficient evidence of negligence that cars were left standing across a city street, with space between them, and such space was suddenly closed without warning to the injury of a passer-by.⁹

§ 462. [Transferred to § 485a].

§ 463. **Care required at highway-crossings.**— The rights of a traveler on the highway, at a point where it is crossed, on a level, by a railroad, are so far subordinate to those of the railroad company as to require the traveler to give way to any train which is in sight or hearing, and moving so rapidly as to

panies to keep some one "always upon the lookout ahead;" yet in any given case, if there was a lookout at the time of the injury, negligence cannot be charged because there had not been one continuously throughout the trip (Louisville, etc. R. Co. v. Stone, 7 Heisk. 468).

⁶ Solen v. Virginia City, etc. R. Co., 13 Nev. 106 [engine backing on a public street, without sidewalk, during a snow storm with high wind; no alarm heard; company liable]; see Neier v. Mo. Pacific R. Co., 12 Mo. App. 35.

⁷ York v. Maine Cent. R. Co., 84 Me. 117; 24 Atl. 790; Louisville, etc. R. Co. v. Coleman, 86 Ky. 556; 6 S. W. 438; Ward v. Chicago, etc. R. Co., 85 Wisc. 601; 55 N. W. 771; Louisville, etc. R. Co. v. Schmidt, 126 Ind. 290; 26 N. E. 45 [child]; Ohio, etc. R. Co. v. McDanel, 5 Ind App. 108; 31 N. E. 836; Chicago, etc. R. Co. v. Gomes, 46 Ill. App. 255 [only one brakeman]; Chicago, etc. R. Co. v. McArthur, 53 Fed. 464; 3 C. C. A. 594; 10 U. S. App. 546 [child upon street opened for pedestrians only].

⁸ The severing of a train of cars in the night-time, leaving the rear portion of them uncontrolled otherwise than by ordinary brakes, to make a running switch across a public highway at grade, without any warning that they are approaching, is in such obvious disregard of the rights of a traveler on the highway, who attempts to drive across after the passage of the first section of the train, that the court is warranted in instructing the jury, as matter of law, not simply that such facts are evidence of negligence, but that they constitute negligence (Delaware, etc. R. Co. v. Converse, 139 U. S. 469; 11 S. Ct. 569). It is a high degree of negligence for a railroad company to make a running or flying switch on a street in a populous part of a city (Kentucky Cent. R. Co. v. Smith, 93 Ky. 449; 20 S. W. 392; Alabama, etc. R. Co. v. Summers, 68 Miss. 566; 10 So. 63).

⁹ Schmitz v. St. Louis, etc. R. Co., 119 Mo. 256; 24 S. W. 472; Cleveland, etc. R. Co. v. Keely, 138 Ind. 600; 37 N. E. 406.

make it doubtful whether he can cross in perfect safety;¹ but in other respects their rights are equal.² In reality, no inequality is implied by the first proposition, since all persons having equal but conflicting rights must accommodate each other and give way according to circumstances. Both parties are equally bound to use ordinary care³ and no more;⁴ that is, such care as a prudent man would usually take under similar circumstances;⁵ the one to avoid committing,⁶ and the other to avoid receiving injury.⁷ For this purpose, it is the duty of the

¹ Warner v. N. Y. Central R. Co., 44 N. Y. 465; rev'g 45 Barb. 299. Compare Galena, etc. R. Co. v. Dill, 22 Ill. 264; Bellefontaine, etc. R. Co. v. Hunter, 33 Ind. 335.

² Pittsburgh, etc. R. Co. v. Maurer, 21 Ohio St. 421; North Penn. R. Co. v. Heileman, 49 Pa. St. 60. It is considered in Texas that the right of a railroad company to operate its trains across a highway should be subordinate to the ordinary public use (Houston, etc. R. Co. v. Carson, 66 Tex. 345; 1 S. W. 107).

³ Chicago, etc. R. Co. v. Still, 19 Ill. 499. All persons have a right to the use of a street-car track at public crossings, and the company is bound to use such care to discover their presence and avoid collisions as an ordinarily prudent person would exercise under the same circumstances (San Antonio, R. Co. v. Mechler, 87 Tex. 628; 30 S. W. 899).

⁴ No more than ordinary care can be required (Richmond, etc. R. Co. v. Yeamans, 86 Va. 860; 12 S. E. 946; International, etc. R. Co. v. McDonald, 75 Tex. 41; 12 S. W. 860). The company is not bound to use the *utmost* care. The care is not to be compared to that required towards a passenger (Pendleton St. R. Co. v. Stallmann, 22 Ohio St. 1). But in Toledo, etc. R. Co. v. Harmon (47 Ill. 298), it was held that the utmost care was required in *cities*, and in going

along highways. The obligations of railroad companies and of travelers crossing their tracks are mutual and reciprocal, and an instruction is erroneous which requires "ordinary" care of the traveler, and "a high degree of care" of the company (Atchison, etc. R. Co. v. McClurg, 59 Fed. 860; 8 C. C. A. 322). In Galveston, etc. R. Co. v. Matula, (79 Tex. 577; 15 S. W. 573), "great care" was held to be a proper requirement.

⁵ Continental Imp. Co. v. Stead, 95 U. S. 161; Cumming v. Brooklyn R. Co., 104 N. Y. 669; 10 N. E. 855; Weber v. N. Y. Central R. Co., 58 Id. 451; Pennsylvania Co. v. Krick, 47 Ind. 368; Pennsylvania R. Co. v. Weber, 72 Pa. St. 27; Shaw v. Boston & Worcester R. Co., 8 Gray, 45; Cleveland, etc. R. Co. v. Terry, 8 Ohio St. 570, 580; Pendleton St. R. Co. v. Stallmann, 22 Ohio St. 1; Gulf, etc. R. Co. v. Hodges, 76 Tex. 90; 13 S. W. 64.

⁶ Warner v. N. Y. Central R. Co., 44 N. Y. 465; Macon, etc. R. Co. v. Davis, 18 Ga. 679; Linfield v. Old Colony R. Co., 10 Cush. 562; Bradley v. Boston, etc. R. Co., 2 Id. 539; see Brand v. Schenectady, etc. R. Co., 8 Barb. 368.

⁷ Stublely v. Northwestern R. Co., L. R. 1 Exch. 13; 4 Hurlst. & C. 83; Shaw v. Boston & Worcester R. Co., 8 Gray, 45; Chicago, etc. R. Co. v. Still, 19 Ill. 499; Brand v. Schenec-

engineer to keep watch for travelers,⁸ and, upon approaching a highway-crossing, it is generally his duty to give sufficient signals of the approach of the train, by ringing his bell, sounding the whistle,⁹ displaying headlights, and other sufficient lights at night,¹⁰ or otherwise, as may be usual, and also to approach crossings in populous places, or which he knows to be continually thronged with travelers and unprotected by the company, at such moderate speed as will enable him to check the train promptly if necessary.¹¹ Trains must

tady, etc. R. Co., 8 Barb. 368; North Penn. R. Co. v. Heileman, 49 Pa. St. 60.

⁸ Bernhard v. Rensselaer, etc. R. Co., 1 Abb. Ct. App. 131.

⁹ These are statutory regulations, nearly universal in America. Where such statutes do not exist, there is no rule requiring the use of exactly these precautions as matter of law (Vandewater v. N. Y. & New England R. Co., 135 N. Y. 583; 32 N. E. 636; Spencer v. Illinois Central R. Co., 29 Iowa, 55; Artz v. Chicago, etc. R. Co., 44 Id. 284; Zeigler v. Northeastern R. Co., 7 S. C. 402). But their omission is competent and sufficient evidence to sustain a verdict of negligence (Vandewater v. N. Y. & New England R. Co., *supra*; and again, 74 Hun, 32; Sauerborn v. N. Y. Central R. Co., 69 Id. 429; 23 N. Y. Supp. 478; Loucks v. Chicago, etc. R. Co., 31 Minn. 526; 18 N. W. 651; Childs v. Pennsylvania R. Co., 150 Pa. St. 73; 24 Atl. 341). An instruction that it was negligence (independent of statute) not to blow whistle or ring bell where the crossing was so constructed that travelers could not see approaching trains, held proper (Funston v. Chicago, etc. R. Co., 61 Iowa, 452). It is the duty of the engineer to give signals of warning to travelers at crossings, although none are required by statute; and an habitual neglect of such duty is an indictable nuis-

ance (Louisville, etc. R. Co. v. Commonwealth, 13 Bush, 388). The fact that a railroad crosses a highway on a trestle does not exempt the company from the duty of giving warning of the approach of its trains to such crossing (Rupard v. Chesapeake, etc. R. Co., 88 Ky. 280; 11 S. W. 70).

¹⁰ Maginnis v. N. Y. Central R. Co., 52 N. Y. 215; Cheney v. N. Y. Central R. Co., 16 Hun, 415; Burling v. Illinois Central R. Co., 85 Ill. 18; International, etc. R. Co. v. Smith, 62 Tex. 252; Texas, etc. R. Co. v. Lowry, 61 Id. 149. Carrying a bright headlight at night is evidence of care (Little Rock, etc. R. Co. v. Holland, 40 Ark. 336; Little Rock, etc. R. Co. v. Hensen, 39 Id. 413).

¹¹ Richardson v. N. Y. Central R. Co., 133 N. Y. 563; 30 N. E. 1148; Maginnis v. N. Y. Central R. Co., 52 N. Y. 215; Grippen v. N. Y. Central R. Co., 40 Id. 34; Lafayette, etc. R. Co. v. Adams, 26 Ind. 76; Loucks v. Chicago, etc. R. Co., 31 Minn. 526; Chicago, etc. R. Co. v. Kellam, 92 Ill. 245; St. Louis, etc. R. Co. v. Dunn, 78 Ill. 197. It is not only the duty of the railroad company to ring the bell and blow the whistle of a train approaching a grade crossing at a proper distance therefrom, but also to run the train at a rate of speed proportioned to the danger from the character of the crossing (Ellis v. Lake Shore,

not be run across a highway, so near together, that the usual signals will afford no real warning to travelers.¹² More than this cannot be required,¹³ unless the engineer has actual notice of circumstances demanding special care, such as the presence of any person or thing upon the track, or the like, or unless the crossing is so made that travelers on the highway can neither see nor hear the train or its signals in time to escape danger, in which case he must take such further precautions

etc. R. Co., 138 Pa. St. 506; 21 Atl. 140; *Thompson v. N. Y. Central R. Co.*, 110 N. Y. 636; 17 N. E. 690). In similar cases defendant's negligence was a question for the jury (*Struck v. Chicago, etc. R. Co.*, 58 Minn. 298; 59 N. W. 1022; *Hickey v. New York C. etc. R. Co.*, 9 N. Y. App. Div. 623; 40 N. Y. Supp. 484; *Lloyd v. Albe-marle, etc. R. Co.*, 118 N. C. 1010; 24 S. E. 805). An engineer is not entitled to assume in all cases that persons on a public crossing will get off in time to save themselves, but in running his train at a crossing in a city is bound to observe reasonable diligence, before he discovers peril as well as afterwards (*Georgia Mid-land, etc. R. Co. v. Evans*, 87 Ga. 673; 13 S. E. 580). Evidence that, when 100 feet from the crossing, one could see only 500 feet of the track; that, at 150 feet from the crossing, one could see only 300 feet of the track; and that the train causing the injuries ran 300 feet past the crossing before it stopped,—justified a finding that 40 miles per hour was an unreasonable rate of speed at that crossing (*Hicks v. N. Y., New Haven, etc. R. Co.*, 164 Mass. 424; 41 N. E. 721). The question of negligence should have been submitted to the jury on evidence showing the running of the train, through a town of about 1,100 people, at 40 miles an hour, and faster than the usual rate, without any signals or warning,

across a street much used, the view of which, from some directions, was obstructed (*Pratt v. Chicago, etc. R. Co.*, Iowa, ; 67 N. W. 402). Where the law has not fixed the rate of speed at which cars may be run upon a railroad, in and across the streets of a city, it is generally a question of fact, in each case, whether the actual rate was excessive or dangerous. Whether it is so or not will depend, to some extent, upon the safeguards which are adopted to prevent accidents. It is not correct to say that in every case where a fault in this respect is alleged, the question must be submitted to the jury. If it is clearly shown that on the occasion in question the velocity was not greater than that which had been usually practiced before, with the tacit consent of the community and without accident, it should not be considered an open question whether running at that rate was negligent and unlawful (*Wilds v. Hudson River R. Co.*, 29 N. Y. 315).

¹²*Chicago, etc. R. Co. v. Boggs*, 101 Ind. 522.

¹³*Weber v. N. Y. Central R. Co.*, 58 N. Y. 451; *Bemis v. Connecticut, etc. R. Co.*, 42 Vt. 375; *Toledo, etc. R. Co. v. Goddard*, 25 Ind. 185; *Chicago, etc. R. Co. v. Gretzner*, 46 Ill. 75; *Chicago etc. R. Co. v. Robinson*, 106 Ill. 142.

as he reasonably can.¹⁴ An engineer, on perceiving that any one is on the track, ought to blow his whistle, and to make any other signals in his power to give warning of the danger;¹⁵ and his failure to do so at a public crossing is strong evidence of negligence on the part of the railroad company.¹⁶ He ought also to slacken speed, unless well assured that it is unnecessary,¹⁷ and if he has reason to believe that the person will not quit the track, he must stop, no matter how wrongful the other's act may be.¹⁸ But an engineer is not bound to lower his speed on approaching ordinary highway-crossings in the

¹⁴ *Richardson v. N.Y. Central R. Co.*, 45 N. Y. 846; *Grippen v. N.Y. Central R. Co.*, 40 Id. 34; *Eilert v. Green Bay, etc. R. Co.*, 48 Wisc. 606. Failure to check the speed of a hand-car, where a traveler was seen about to pass upon the track before it, is negligence (*Moore v. Central R. Co.*, 47 Iowa, 688). To same effect, *Lake Shore, etc. R. Co. v. Franz*, 127 Pa. St. 297; 18 Atl. 22. It is the duty of railroad companies to exercise vigilant care in operating trains at public crossings to prevent injury to individuals, which includes the duty of ringing the bell and blowing the whistle on the approach of a train, and also of stopping the train, if practicable, to avoid injury, and of keeping a constant lookout (*Florida, etc. R. Co. v. Williams*, 37 Fla. 406; 20 So. 558). If the engineer, on approaching a highway crossing, fails to give the usual signals, it is his duty to keep a more vigilant watch along the track (*Hinkle v. Richmond, etc. R. Co.*, 109 N. C. 472; 13 S. E. 884). It was not error to charge that, if the jury believed that by reason of the proximity of the crossing to Mayfield and the number of traveling public crossing there, or by reason of any obstruction of view of the railroad or of the hearing of approach of trains, said crossing was unusually dangerous, then it was defendant's duty to use ordinary care

to discover such danger, and, if necessary to avoid injuries to travelers, to keep a flagman there to warn travelers, or to use some other reasonably safe and effectual mode of warning travelers of the approach of trains (*Newport News, etc. R. Co. v. Stewart*, Ky. ; 36 S. W. 528).

¹⁵ *Schulz v. Chicago, etc. R. Co.*, 57 Minn. 271; 59 N. W. 192.

¹⁶ See note 9, *ante*.

¹⁷ *Moore v. Central R. Co.*, 47 Iowa, 688; *Pope v. Kansas City R. Co.*, 99 Mo. 400; 12 S. W. 891.

¹⁸ *Central R. Co. v. Glass*, 60 Ga. 441; *Purinton v. Maine Central R. Co.*, 78 Me. 569; 7 Atl. 707; *Bouwmeester v. Grand Rapids, etc. R. Co.*, 63 Mich. 557; 30 N. W. 337; *Chicago, etc. R. Co. v. Hogarth*, 38 Ill. 370; *Hinkle v. Richmond, etc. R. Co.*, 109 N. C. 472; 13 S. E. 884; *Friess v. N. Y. Central R. Co.*, 67 Hun, 205; 23 N. Y. Supp. 104 [boy twelve years old caught his foot in a frog which was unblocked]. The failure of a locomotive engineer to bring his train to a full stop at a street crossing, on discovering that an approaching team is frightened, is negligence (*Houston, etc. R. Co. v. Carson*, 66 Tex. 345; 1 S. W. 107). In *Indiana, etc. R. Co. v. Wheeler* (115 Ind. 253; 17 N. E. 563), it was held that these rules had been sufficiently obeyed.

open country, where travelers only pass occasionally.¹⁹ If the engineer sees persons or teams approaching or waiting to cross the railroad, he is not bound to anticipate that they will attempt to cross in view of the train; and, therefore, he is not usually required to check his speed so much as would be necessary to enable them to cross in front of him.²⁰ Although it is not negligence *per se* for a train to be behind time, yet the fact that it is off time increases and heightens the duty

¹⁹ Warner v. N. Y. Central R. Co., 44 N. Y. 465; compare Bellefontaine, etc. R. Co. v. Hunter, 33 Ind. 335; Lafayette, etc. R. Co. v. Adams, 26 Id. 76; Raiford v. Mississippi, etc. R. Co., 43 Miss. 233; Reading, etc. R. Co. v. Ritchie, 102 Pa. St. 425 [thirty miles an hour]; Lockwood v. Chicago, etc. R. Co. [Ill.], 12 N. W. 401 [running at eight or ten miles an hour on a certain curve, not negligence]. See Phila. etc. R. Co. v. Fronk, 67 Md. 339; 10 Atl. 204, 307. Where no municipal or statutory regulation was violated by defendant, and the rate of speed was about twenty miles an hour at an ordinary highway crossing, the question of defendant's negligence should not be submitted to the jury (Heaney v. Long Island R. Co., 112 N. Y. 122; 19 N. E. 422). The running of railroad trains over crossings in the open country at a high rate of speed is not negligence *per se* (Childs v. Pennsylvania R. Co., 150 Pa. St. 73; 24 Atl. 341); nor can a jury find it so (Ib.). It is not negligence *per se* to run a train across a country road at a rate of fifty miles an hour (Newhard v. Pennsylvania R. Co., 153 Pa. St. 417; 26 Atl. 105); nor at a rate of fifty-five or sixty miles an hour (DuBoise v. N. Y. Central R. Co., 88 Hun, 10; 34 N. Y. Supp. 279). The running on schedule time across a highway in a city of 17,000 inhabitants at a rate of twenty-five miles an hour is

not, in the absence of an ordinance limiting the speed to a lower rate, negligence *per se* (Tobias v. Michigan Cent. R. Co., 103 Mich. 330; 61 N. W. 514). It is not objectionable to direct a verdict for plaintiff if his injuries were occasioned by the trains running over the crossing at a greater rate of speed than was usual and was reasonably safe for persons about to go across the track (St. Louis, etc. R. Co. v. Odum, 156 Ill. 78; 40 N. E. 559). s. P., Chicago, etc. R. Co. v. Florens, 32 Ill. App. 365. The company is not bound to stop its trains nor slacken their speed on approaching public crossings, and a traveler who attempts to cross must be held to be aware of this rule, and act with reference to it (Ohio, etc. R. Co. v. Walker, 113 Ind. 196; 15 N. E. 234). To same effect, Dyson v. N. Y. & New England R. Co., 57 Conn. 9; 17 Atl. 137.

²⁰ It is not any want of ordinary care for a train of cars to approach a crossing at its usual speed, although there is a carriage approaching or standing near it (Warner v. N. Y. Central R. Co., 44 N. Y. 465; Telfer v. Northern R. Co., 30 N. J. L. 188; Rigler v. Charlotte, etc. R. Co., 94 N. C. 604; Smith v. Citizens' R. Co., 52 Mo. App. 36 [cable railway]). But see Moore v. Central R. Co., 47 Iowa, 688, and Illinois Cent. R. Co. v. Slater, 139 Ill. 190; 28 N. E. 830 [jury may find otherwise].

resting upon the engineer to give such additional warnings of its approach to a street-crossing, and to use such moderation in speed as will give persons in the street, who are not aware that it is off time, better opportunity to guard against the danger than they would from regular trains running on schedule time.²¹ Making a "flying switch" or speeding disconnected cars across a highway is always some evidence of negligence,²² and if done without careful precautions against danger,²³ or in a thickly peopled district,²⁴ it is strong evidence of gross negligence.

§ 464. **Care required at other crossings.**—The servants of a railroad company are not usually bound to anticipate that any person will cross at a point not permitted to be used as a crossing.¹ And, while they must use the same degree of care to avoid injury to a person thus wrongfully crossing, after they become aware of the fact,² they are not in fault for not making signals at such points, whether moving forward³ or backward,⁴

²¹ *Güggenheim v. Lake Shore, etc. R. Co.*, 66 Mich. 150; 33 N. W. 161; *Robert v. Alexandria, etc. R. Co.*, 83 Va. 312; 2 S. E. 518.

²² *White v. Fitchburg R. Co.*, 136 Mass. 321; *Howard v. St. Paul, etc. R. Co.*, 32 Minn. 214; 20 N. W. 93.

²³ *O'Connor v. Mo. Pacific R. Co.*, 94 Mo. 150; *Kay v. Pennsylvania R. Co.*, 65 Pa. St., 269. A railroad company which, without precaution or warning, sends cars across a public crossing, under no control, is liable for wanton and reckless negligence (*Lake Shore, etc. R. Co. v. Johnson*, 135 Ill. 641; 26 N. E. 510). s. p., as to shunting cars, *Schindler v. Milwaukee, etc. R. Co.*, 87 Mich. 400; 49 N. W. 670; *Butler v. Milwaukee, etc. R. Co.*, 23 Wisc. 487; *Schlimgen v. Chicago, etc. R. Co.*, 90 Id. 186; 62 N. W. 1045; *Tierney v. Chicago, etc. R. Co.*, 84 Iowa, 641; 51 N. W. 175 [no flagman or lookout] But the company was not guilty of negligence in making a flying switch over a crossing on a stormy evening,

where the cars moved at a rate of less than six miles an hour, and, in addition to the signal lights placed thereon, the front car was brightly lighted, and the bell of the engine which followed the cars was ringing (*Smith v. Maine Cent. R. Co.*, 87 Me. 339; 32 Atl. 967).

²⁴ *Brown v. N. Y. Central R. Co.*, 32 N. Y. 597. It is gross negligence for a railroad company to allow its cars to be "kicked" across a crowded street crossing, where no watchman is stationed, without sounding a whistle or bell (*Peltier v. Louisville, etc. R. Co.*, Ky.; 29 S. W. 30).

¹ See § 484, *post*.

² *Barry v. N. Y. Central R. Co.*, 92 N. Y. 289; *Byrne v. N. Y. Central R. Co.*, 104 Id. 362.

³ *Zimmerman v. Hannibal, etc. R. Co.*, 71 Mo. 476; *Shackleford v. Louisville, etc. R. Co.*, 84 Ky. 43.

⁴ *Woodyard v. Kentucky Central R. Co.* [Ky.], 15 S. W. 178.

so long as they have no notice of the fact that a person is crossing or is about to do so. Nor can a person crossing at an unusual place complain that he was misled by the undue proximity of trains. Railroad rules, regulating the intervals between trains, are intended solely for the protection of the property of the company, and to secure the safety of employees and passengers, and not for the guidance of persons traveling along the highway; and no inference of negligence can be drawn from the proximity of trains, in disregard of such a rule, in an action to recover damages for an injury done to a person while crossing the railroad at a place not proper for crossing.⁵ When a private crossing has been lawfully constructed across a railroad, trainmen must keep reasonable watch for persons crossing;⁶ but, under ordinary circumstances, they are not bound to slacken speed,⁷ nor to give such signals as are required at highway crossings.⁸ But if signals have usually been given, they must be maintained;⁹ and they must be given, if the trainmen have actual or constructive notice that persons will cross, or may be expected to cross, when the train

⁵ *Phil. & Reading R. Co. v. Spearen*, 47 Pa. St. 300; see *French v. Taunton R. Co.*, 116 Mass. 537.

⁶ See *Gurley v. Missouri Pac. R. Co.*, 122 Mo. 141; 26 S. W. 953; *Carraher v. San Francisco Bridge Co.*, 100 Cal. 177; 34 Pac. 828; *Pennsylvania R. Co. v. Hammill*, 56 N. J. Law 370; 29 Atl. 151 [footway permitted by company to be laid over track]. The duty of a railroad company not to injure, by its own act, a person on a crossing which is not a public crossing, is the same, whether such person is there by implied invitation, or is a mere licensee (*Pomponio v. N. Y. & New Haven R. Co.*, 66 Conn. 528; 34 Atl. 491).

⁷ An engineer seeing a team on a private crossing at a great distance need not at once proceed to stop or slow his train, but only when it is apparent that there is danger of collision (*Frost v. Milwaukee, etc. R. Co.*, 96 Mich. 470; 56 N. W. 19). See

Thomas v. Delaware, etc. R. Co., 19 Blatchf. 533.

⁸ Even signals are not usually necessary at private crossings (*Sandborn v. Detroit, etc. R. Co.*, 91 Mich. 538; 52 N. W. 153; *Burk v. Delaware, etc. Canal Co.*, 86 Hun, 519; 33 N. Y. Supp. 986).

⁹ Where a railway company has recognized and acquiesced in the use of a private wagon-crossing over its tracks, and adopted the usual signals therefor on the approach of its trains, it cannot lawfully discontinue the signals without notice (*Westaway v. Chicago, etc. R. Co.*, 56 Minn. 28; 57 N. W. 222). To similar effect, *Nash v. N. Y. Central R. Co.*, 51 Hun, 594; 4 N. Y. Supp. 525; *Vandewater v. N. Y., New England R. Co.*, 74 Hun, 32; 26 N. Y. Supp. 397). s. p., as to whistle post, *Hinkle v. Richmond, etc. R. Co.*, 109 N. C. 472; 13 S. E. 884). Same principle, § 466, *post*.

is approaching.¹⁰ So, when view of the track is so obstructed as to make it prudent, signals should be given, or speed slackened, or both.¹¹ Where, for any good reason, a person has a right to cross, and may reasonably be expected to do so, when the train is approaching, much the same common-law rules apply as in the case of a highway-crossing; as, for example, where one intending to become a passenger, crosses a side-track to reach a passenger train on the main track,¹² or where the company has long allowed the public habitually to cross,¹³

¹⁰ So held, where crossing was by mere permission (*Owens v. Pennsylvania R. Co.*, 41 Fed. 187; *Texas, etc. R. Co. v. Watkins*, Tex. Civ. App. ; 26 S. W. 760).

¹¹ *Thomas v. Delaware, etc. R. Co.*, 19 Blatchf. 533. It cannot be said as matter of law that it is not negligence to run an extra train rapidly over a private crossing without ringing a bell or giving other warning, when the approach of the train is concealed by bushes (*Chicago, etc. R. Co. v. Sanders*, 154 Ill. 531; 39 N. E. 481). Whether it was negligence for the engineer not to give signals by whistling or ringing a bell in the neighborhood of a dangerous private crossing was a question for the jury (*Roach v. St. Joseph, etc. R. Co.*, 55 Kans. 654; 41 Pac. 964).

¹² *Indiana Central R. Co. v. Hudson*, 13 Ind. 325.

¹³ At a place on the line of a railroad where, although not a public highway, there is a crossing constantly and notoriously used as such by the public, without objection on the part of the company, the latter is bound to give some reasonable notice and warning of the approach of trains, although not absolutely bound to ring a bell or blow a whistle (*Byrne v. N. Y. Central R. Co.*, 104 N. Y. 362; 10 N. E. 539). The court is not bound to charge that if the bell was rung that was a sufficient warning, but it is a question for

the jury whether such notice or warning was given as was proper and reasonable under the circumstance (*Id.*). To same effect, *Swift v. Staten I. R. Co.*, 123 N. Y. 645; 25 N. E. 378; *Vandewater v. N. Y. & New England R. Co.*, 74 Hun, 32; 26 N. Y. Supp. 397. When a railroad company has for years, without objection, permitted the public to cross its track at a certain point, not in itself a public crossing, those using the crossing are not trespassers, and the company owes the duty of reasonable care towards them (*Taylor v. Delaware, etc. Canal Co.*, 113 Pa. St. 162, 175; *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434; 15 S. W. 665 [use for one year]; *Norfolk, etc. R. Co. v. Carper*, 88 Va. 556; 14 S. E. 328 [distinction between trespasser and licensee]; *Schindler v. Milwaukee, etc. R. Co.*, 87 Mich. 400; 49 N. W. 670; *Clampit v. Chicago, etc. R. Co.*, 84 Iowa, 71; 50 N. W. 673; *Lynch v. St. Joseph, etc. R. Co.*, 111 Mo. 601; 19 S. W. 1114 [after habitual use of right of way by pedestrians, they are not trespassers]; see *Hanks v. Boston, etc. R. Co.*, 147 Mass. 495; 18 N. E. 218 [question for jury, whether an inducement had been held out to the public to use the crossing]; *Armstrong v. N. Y., New Haven, etc. R. Co.*, R. I. ; 29 Atl. 448 [pleading]. The fact, if true, that the engineer of such locomotive was ignorant of

even though it be in violation of its rules,¹⁴ or of a statute making it an offense to walk upon the track.¹⁵ But there must be some proof of invitation or notice and acquiescence on the part of the company, to sustain such obligations.¹⁶ These rules, however, are not absolute rules of law, but are only such as a jury may in its discretion enforce, when satisfied of their justice, under the facts of each case, within these limits. A railroad company is not liable for an injury done to property (*e. g.* fire hose) lawfully laid across its track, unless the engineer of a passing train is seasonably warned to stop, in such manner as to inform him of his duty to do so, since he has a right to presume that it is his duty to proceed,¹⁷ but if in such a case such warning is given, the company is liable.¹⁸

the existence and use of such pathway, would not relieve defendant of liability, if no signal was given (*Mitchell v. Boston, etc. R., N. H.* ; 34 Atl. 674). The fact that people are accustomed to cross a track at a certain place, and that the company makes no objection, does not, as a matter of law, import a license, but it is a question for the jury (*Chenery v. Fitchburg R. Co., 160 Mass. 211 ; 35 N. E. 554*). The following cases are restrictive of the preceding decisions: Where a railroad company acquiesces in the use of a private crossing, persons using it are mere licensees, and all that can be required of the company at such place is to look out for obstructions, and to use due care to avoid injury after being conscious of im-

pending peril (*Alabama Gt. So. R. Co. v. Linn, 103 Ala. 134 ; 15 So. 508*). Where workmen had long been in the habit of crossing the track on their way to and from work, and one was killed by a disconnected car which started of itself, and ran down a grade, because the brakes were not set, Held, that the company owed no duty to deceased to set the brakes or otherwise fasten the car (*Sutton v. N. Y. Central R. Co., 66 N. Y. 243 ; rev'g 4 Hun 760 ; and adopting the principle of Nicholson v. Erie R. Co., 41 N. Y. 525*). A license to pass over tracks in a populous part of a city, where there is no public or private way, at a place where stationary cars are continuously on the tracks, cannot be implied from mere acquiescence,

¹⁴ *Rogers v. Rhymney R. Co., 26 L. T. N. S. 879 ; Dublin, etc. R. Co. v. Slattery, L. R. 3 App. Cas. 1155 ; Delaney v. Milwaukee, etc. R. Co., 33 Wisc. 67.*

¹⁵ *DAVIS v. Chicago, etc. R. Co., 58 Wisc. 646 ; Townley v. Chicago, etc. R. Co., 53 Id. 626 ; Le May v. Missouri Pac. R. Co., 105 Mo. 361 ; 16 S. W. 1049.*

¹⁶ *Young v. Old Colony R. Co., 156 Mass. 178 ; 30 N. E. 560.*

¹⁷ *Mott v. Hudson River R. Co., 1 Robertson, 585* [train running over hose without notice, thus causing destruction of plaintiff's house by fire].

¹⁸ *Metallic Casting Co. v. Fitchburg R. Co., 109 Mass. 277* [same, *after* notice].

§ 464a. **Intersecting railroads.**—The terrible disasters which have resulted from the practice, so frequent in America, of independent railroads crossing each other at a level, have led to a very general regulation of the subject by statutes; which we shall not attempt to reproduce here.¹ When by statute or otherwise, it becomes the duty of an engineer to stop, before crossing another railroad, an engineer on such other road may act upon the assumption that the rule will be obeyed.² But if he sees that the other engineer is disobeying the rule, he has no right to act upon such an assumption any longer, and must himself stop, although entitled to the right of way.³ Where the rule prescribes a fixed point for stoppage, before crossing, it is not complied with by stopping 150 feet short of that point.⁴ Disobedience of such a rule is of no importance, if it did not contribute to the accident.⁵ Leaving a car standing partly on intersecting tracks is an act of plain negligence; and it is no excuse that the train injured thereby was ahead of time.⁶

but express consent is necessary (Central R. Co. v. Rylee, 87 Ga. 491; 13 S. E. 584). Evidence of a custom to walk on defendant's track at the place of the accident is incompetent,

as calculated to induce the inference that defendant was held to greater care there than at other points (Memphis, etc. R. Co. v. Womack, 84 Ala. 149; 4 So. 618).

¹ In Kentucky, see Stat., March 10, 1894. In Alabama, see Code, § 1145, construed in Richmond, etc. R. Co. v. Freeman, 97 Ala. 289; 11 So. 800. In Texas, see Rev. Stat., art. 4232, construed in Houston, etc. R. Co. v. Brin, 77 Tex. 174; 13 S. W. 886. In Tennessee, see Code, Mill. & V. § 1304. This statute, which requires trains on one railway to stop before crossing the line of another railway, has no application to the crossing by a steam railway of an ordinary horse-car line (Byrne v. Kansas City, etc. R. Co., 9 C. C. A. 666; 61 Fed. 605).

² N. Y., Chicago, etc. R. Co. v. Grand Rapids, etc. R. Co., 116 Ind. 60; 18 N. E. 182.

³ Pratt v. Chicago, etc. R. Co., 38 Minn. 455; 38 N. W. 356.

⁴ Defendant's train was stopped

about 150 feet before reaching the stopping post; the view was there much obstructed by timber; the engineer first saw the other train when it was directly on the crossing, about 100 feet in front of him; and he reversed the engine, and applied sand to the rails, but was unable to stop. Held, that a verdict against defendant was warranted (Kansas City, etc. R. Co. v. Stoner, 51 Fed. 649; 2 C. C. A. 437; 10 U. S. App. 209).

⁵ Kansas City, etc. R. Co. v. McDonald, 51 Fed. 178; 2 C. C. A. 153; 4 U. S. App. 563.

⁶ An action for injuries to an engineer upon a locomotive, sustained through collision with a car of a construction train upon an intersecting road, left projecting across the

§ 465. **Care of stationary cars and engines.**—A railroad company does not owe to persons who, without invitation, come upon its land, however innocently, the duty of putting guards over its cars or fastening them in any way, when standing upon its own premises. Thus where one who had a bare license to enter a railroad yard was injured by a car, which was blown down the track by a violent gale, it was held that he could not recover; although, if a brakeman had been on the car, the injury could not have happened.¹ So also, where cars, not fastened by brakes, started down grade and injured one crossing the track, under a mere claim of acquiescence.² And so it was held, where children were injured by the accidental movement of an empty car on which they were playing without permission, although, by reason of their extreme youth, the court would not impute fault to the children.³ But it is otherwise as to persons on other premises, or entering the railroad premises by invitation or of right.⁴ And a locomotive, when its steam is up, must be constantly guarded.⁵

track, uncoupled from the train, so that it could not be removed in time to prevent the collision,—sustained; although plaintiff's train was running ahead of the usual schedule time and defendant's servants did not anticipate its approach at that time (*Albert v. Sweet*, 116 N. Y., 363; 22 N. E. 762).

¹ *Nicholson v. Erie R. Co.*, 41 N. Y. 525.

² *Sutton v. N. Y. Central R. Co.*, 66 N. Y. 243.

³ *Chicago, etc. R. Co. v. McLoughlin*, 47 Ill. 265; *Chicago, etc. R. Co. v. Stumps*, 69 Id. 409. Where a child of seven tried to cross a street covered by a train of cars about to start, by passing between two cars connected by a coupling pole 14 feet long it was the duty of the railroad to give notice to him of the starting of the train (*Philadelphia, etc. R. Co. v. Layer*, 112 Pa. St. 414; 3 Atl. 874).

⁴ *Chicago, etc. R. Co. v. Krueger*, 124 Ill. 457; 17 N. E. 52 [servant

on railroad]. Compare *Smith v. N. Y. Central R. Co.*, 118 N. Y. 645; 23 N. E. 990; *Williams v. Norfolk, etc. R. Co.* [Va.], 15 S. E. 522. A railroad company owes to passengers a duty to secure a car, left standing upon a side track, so that it cannot be started by any of the ordinary wind storms liable to occur in that locality (*Webster v. Rome, etc. R. Co.*, 40 Hun, 161; *aff'd*, 115 N. Y. 112; 21 N. E. 725). *s. p.*, *Union Pacific R. Co. v. Harwood*, 31 Kans. 388; 2 Pac. 605; *Battle v. Wilmington, etc. R. Co.*, 66 N. C. 343.

⁵ It is the duty of a railroad company to take reasonable precautions to prevent its engines being tampered with or moved while in the yard unused, and whether or not the employment of but one person in the yard to care for the engines and act as watchman was such reasonable precaution was for the jury (*Southern Pac. Co. v. Lafferty*, 57 Fed. 536; 6 C. C. A. 474).

§ 466. **Gates, flagmen and watchmen.**— There is no general rule of common law which requires that railroad companies should erect a gate,¹ or station a flagman or watchman at every highway crossing;² nor, in New York, is it even a question to be left to a jury.³ But almost everywhere else, it is held that, while the question is not invariably to be left to the jury, it is to be submitted to them, where special circumstances exist, which might reasonably call for such precautions.⁴ Thus, a

¹ "The duty of posting flagmen or having servants and agents or placing gates or other obstructions, or of giving special or personal notice to travelers at railway crossings can only be imposed by the legislature" (*Weber v. N. Y. Central R. Co.*, 58 N. Y. 451, 459; *Welsch v. Hannibal, etc. R. Co.*, 72 Mo. 451).

² *Stubley v. Northwestern R. Co.*, L. R. 1 Exch. 13; 4 Hurlst. & C. 83; see *Walker v. Midland R. Co.*, 14 Law Times N. S. 796; *Bilbee v. Brighton, etc. R. Co.*, 18 C. B. N. S. 584; *Coyle v. Long Island R. Co.*, 33 Hun, 37; *Case v. N. Y. Central R. Co.*, 75 Hun, 527; 27 N. Y. Supp. 496; *Carraher v. San Francisco Bridge Co.*, 81 Cal. 98; 22 Pac. 480.

³ *Beisiegel v. N. Y. Central R. Co.*, 40 N. Y. 9; *Houghkirk v. Delaware, etc. Canal Co.*, 92 N. Y. 219; *McGrath v. N. Y. Central R. Co.*, 63 Id. 522; *Stubley v. Northwestern R. Co.*, L. R. 1 Exch. 13; *Clarke v. Midland R. Co.*, 43 Law Times, 381. A railroad corporation is entitled to have the jury charged that no negligence can be imputed to it because there was no flagman or gate at a crossing (*Cohn v. N. Y. Central R. Co.*, 6 N. Y. App. Div. 196; 39 N. Y. Supp. 986).

⁴ A railroad company must use reasonable care in regard to stationing flagmen or erecting gates at crossings, and the fact that the statute of Michigan charges the railroad commissioner with the duty

of determining the necessity of a flagman at crossings and he has not required it, is not conclusive (*Grand Trunk R. Co. v. Ives*, 144 U. S. 408; 12 S. Ct. 679). *s. p.*, *Freeman v. Duluth, etc. R. Co.*, 74 Mich. 86; 41 N. W. 872 [obstructed view in city]. Whether or not a railroad company was guilty of negligence in running trains at 40 miles an hour over a grade crossing, without maintaining a flagman to protect the public using the highway, held a question of fact for the jury (*Huntress v. Boston, etc. R. Co.*, 66 N. H. 185; 34 Atl. 154). In an action against a railroad company for injuries at one of its crossings in a city, it is a question for the jury whether a flagman was reasonably necessary, and the failure of the city to require a flagman to be placed at the crossing in question is no excuse to the defendant, if reasonable care for the safety of the public required it to be done (*Chicago, etc. R. Co. v. Lane*, 130 Ill. 116; 22 N. E. 513; *Chicago, etc. R. Co. v. Perkins*, 125 Ill. 127; 17 N. E. 1; *Kinney v. Crocker*, 18 Wisc. 74; *Winstanley v. Chicago, etc. R. Co.*, 72 Id. 375; 39 N. W. 856; *Hoye v. Chicago, etc. R. Co.*, 67 Wisc. 1; 29 N. W. 646; *Dwinnell v. Abbott*, 74 Wisc. 514; 43 N. W. 496; *Schmidt v. Burlington, etc. R. Co.*, 75 Iowa, 606; 39 N. W. 916; *Omaha, etc. R. Co. v. Brady*, 39 Neb. 27; 57 N. W. 767). To similar effect, *Curley v. Illinois Cent. R. Co.*, 40 La. Ann. 810; 6 So. 103.

jury may determine whether a man ought to be stationed at a crossing, where there is peculiar danger of accidents, as from obstructions to the view of approaching trains, where many pass;⁵ but a jury cannot be allowed to decide that a flagman should be stationed at any point not unusually hazardous.⁶ What comes within this definition, is a question upon which there are differing decisions.⁷ Where a railroad company is under no original obligation to station a flagman at a particular crossing, yet if it has done so for a long time, travelers have a right to presume, in case of his absence, that the road is clear.⁸ So they have, where the company is legally bound to keep a man at the crossing, though the obligation be created only in favor of other persons.⁹ The establishment of a flag-station at a crossing is evidence of the consent of the company to the

In Massachusetts, the jury may consider, whether under all the circumstances, the company was guilty of negligence in not having a gate or flagman at the crossing, although never requested by the selectmen of the town nor ordered by the county commissioners to do so, under the statute (*Eaton v. Fitchburg R. Co.*, 129 Mass. 364; see *French v. Taunton R. Co.*, 116 Mass. 537).

⁵ *Bilbee v. Brighton, etc. R. Co.*, 18 C. B. N. S. 584; *Hart v. Chicago, etc. R. Co.*, 56 Iowa, 166; 7 N. W. 9; 9 Id. 116; *Annacker v. Chicago, etc. R. Co.*, 81 Iowa, 267; 47 N. W. 68; *Chicago, etc. R. Co. v. Perkins*, 26 Ill. App. 67.

⁶ To warrant a jury in saying that a railroad company should station a flagman or erect gates at a crossing when not required by the officer charged by statute with power to require them, it must be shown that such crossing is more than ordinarily hazardous (*Grand Trunk R. Co. v. Ives*, 144 U. S. 408; 12 S. Ct. 679).

⁷ See *Stubley v. Northwestern R. Co.*, L. R. 1 Exch. 13; 4 Hurlst. & C. 83; *Beisiegel v. N. Central R. Co.*, 40 N. Y. 9; *Commonwealth v. Boston, etc. R. Co.*, 101 Mass. 201; *Telfer*

v. Northern R. Co., 30 N. J. Law. 188, holding to a stricter rule than the cases cited in note 4.

⁸ *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 35, 42; s. c. again. 39 Id. 61; *Dolan v. Delaware, etc. Canal Co.*, 71 Id. 285; *Kissenger v. N. Y. & Harlem R. Co.*, 56 Id. 538; see, also, *McGrath v. N. Y. Central R. Co.*, 63 Id. 522; *McGovern v. N. Y. Central R. Co.*, 67 Id. 417; *State v. Boston, etc. R. Co.*, 80 Me. 430; 15 Atl. 36 [gates wide open: flagman absent]; *Pennsylvania R. Co. v. Matthews*, 36 N. J. Law. 531 [flagman usually kept at place, but casually absent]; *Richmond v. Chicago, etc. R. Co.*, 87 Mich. 374; 49 N. W. 621; *Burns v. North Chicago, etc. Mill Co.*, 65 Wisc. 312. To same effect, *Dundon v. N. Y., New Haven, etc. R. Co.*, 67 Conn. 266; 34 Atl. 1041.

⁹ *Stapley v. Brighton, etc. R. Co.*, L. R. 1 Exch. 21; 4 Hurlst. & C. 93. The plaintiff in that case was a foot-passenger, and the obligation to keep a watchman was created solely for the benefit of drivers of vehicles. Compare *Chicago, etc. R. Co. v. Eisinger*, 114 Ill. 79; 29 N. E. 196.

use of the crossing by travelers.¹⁰ In England, railroad companies are bound by statute to keep a man at every level highway crossing to open and shut the gates for vehicles.¹¹ Where a gate is kept, whether required by law or not, the man in charge must use a reasonable discretion as to the time of opening it; and it is negligence in him, for which his principal is responsible, to open a gate and invite a vehicle to pass through, when a train is approaching.¹² The mere opening of a gate is equivalent to an invitation to cross;¹³ and even if the gate is opened by a stranger, the company is responsible for failing to close it, within a reasonable time.¹⁴ It is unquestionably the duty of the company to have a person in constant attendance upon a switch, unless it is permanently fastened down.¹⁵ Even in New York, the want of a flagman may be proved, for the purpose of showing what degree of care ought

¹⁰ *Webb v. Portland, etc. R. Co.*, 57 Me. 117.

¹¹ Stat. 8 & 9 Vict. ch. 20, § 47.

¹² *Lunt v. Northwestern R. Co.*, L. R. 1 Q. B. 277; *S. P.*, *Bayley v. Eastern R. Co.*, 125 Mass. 62. Though a flagman may have signaled persons in a carriage to advance over the crossing, yet on discovering a train almost on the crossing, and the carriage coming in disregard of it, he is not negligent in stopping the horse by any means in his power, even if in doing so he frighten the horse — a thing which with cooler judgment he might have avoided (*Floyd v. Philadelphia, etc. R. Co.*, 162 Pa. St. 29; 29 Atl. 396).

¹³ *Wanless v. Northeastern R. Co.*, L. R. 6 Q. B. 481; *aff'd*, L. R. 7 H. L. 12; *Scaggs v. Delaware, etc. Canal Co.*, 74 Hun, 198; 26 N. Y. Supp. 323; *Kane v. N. Y., New Haven, etc. R. Co.*, 56 Hun, 648; 9 N. Y. Supp. 879; *Wilson v. N. Y., New Haven, etc. R. Co.*, 18 R. I. 491, 598; 29 Atl. 258 [gate voluntary]; *Id.* 300; *Lake Shore, etc. R. Co. v.*

Franz, 127 Pa. St. 297; 18 Atl. 22; *Indianapolis Union R. Co. v. Neubacher*, 16 Ind. App. 21; 43 N. E. 576; *Evans v. Lake Shore, etc. R. Co.*, 88 Mich. 442; 50 N. W. 386. See, also, *Palmer v. N. Y. Central R. Co.*, 112 N. Y. 234; 19 N. E. 678. But, if the traveler knows of the custom to leave the gates open after a certain hour, he is not entitled to rely upon their protection after that hour (*Rainy v. N. Y. Central R. Co.*, 68 Hun, 495; 23 N. Y. Supp. 80). The existence at a railroad crossing of gates, seemingly intended to be shut when trains pass, does not excuse a traveler from the duty of looking before crossing, but does give him the right to take that fact into consideration in determining to what extent he will look (*Merrigan v. Boston, etc. R. Co.*, 154 Mass. 189; 28 N. E. 149).

¹⁴ *Haywood v. N. Y. Central R. Co.*, 59 Hun, 617; 13 N. Y. Supp. 177; *aff'd*, 128 N. Y., 596; 28 N. E. 251.

¹⁵ *Baltimore, etc. R. Co. v. Worthington*, 21 Md. 275.

to be used in his absence.¹⁶ Where a gate is kept, its being open is equivalent to an invitation to pass;¹⁷ and the railroad company is responsible for its negligent management.¹⁸

§ 466a. Duty to maintain fences. — Statutes, which do not affirmatively require fences to be maintained, but simply declare that railroad companies shall be liable for the value of animals injured, in case no fence is maintained (or to similar effect), do not apply to any other cases than those mentioned in the statute. Their benefit, therefore, cannot be claimed for passengers on trains¹ or servants of the railroad. Such is the effect of the Iowa statute² But where (as in New York,

¹⁶ *Friess v. N. Y. Central R. Co.*, 67 Hun, 205; 22 N. Supp. 104; *Reid v. N. Y., New Haven, etc. R. Co.*, 63 Hun, 630; 17 N. Y. Supp. 801, following *dictum* in *Houghkirk v. Delaware, etc. Canal Co.*, 92 N. Y. 219.

¹⁷ The raising of a gate at a railroad crossing is substantial assurance of safety, just as significant as if the gateman had beckoned or invited the traveler to come on, and that any prudent man would not be influenced by it is against all human experience (*Glushing v. Sharp*, 96 N. Y. 676).

¹⁸ Plaintiff having looked both ways, and hearing no bell, entered on defendants' crossing when the gates were up; the gates began to be let down, after he was part way across the track; and upon the gate-keeper's failure to raise the gate on his request, he drove as far from the track as he could, but the train striking his buggy he was thrown or jumped out. Held, that a refusal to direct a verdict for defendants was proper (*Warren v. Boston, etc. R. Co.*, 163 Mass. 484; 40 N. E. 895). The company is bound to use due care in operating the gates so as to protect travelers upon the public highway, not only from being run

over by the cars, but also against injury from the gates themselves. If on reaching a crossing protected by safety gates, a person finds them raised and motionless, he is at liberty to go on, and if it becomes necessary to lower the gates while he is passing between them, it should be done with all the care demanded by the peculiar situation and with due regard to the safety of human life (*Feeney v. Long Island R. Co.*, 116 N. Y., 375; 22 N. E. 402).

¹ *Buxton v. Northeastern R. Co.*, L. R. 3 Q. B. 549. A railroad company is bound, independent of statutes, to provide such fences as would prevent any danger to travelers from animals escaping upon the track (*Lackawanna, etc. R. Co. v. Chenevith*, 52 Pa. St. 383; per Bell, J., *Dean v. Sullivan R. Co.*, 23 N. H. 316).

² Where, as in Iowa, statutes impose no absolute duty upon a company to fence its track, but only subject it to a certain liability for injury to stock caused by a failure so to fence, a company is not liable, under such statutes, for an injury to a child caused by the absence of a fence (*Walkenhauer v. Chicago, etc. R. Co.*, 17 Fed. 136).

Michigan, etc.) the statute expressly commands fences to be maintained, failure to maintain them is such negligence as entitles any person, whether passenger, traveler or servant of the company, injured thereby, without contributory fault, to recover damages.³ Especially is this the case as to children, who are entitled to the protection of such fences, to keep them from innocently straying upon the track.⁴

§ 467. Neglect of statutory precautions.—Certain precautions are frequently required of railroad companies, by statutes or local ordinances, and enforced by the imposition of penalties for their neglect,—such, for example, as a limitation of speed in certain places, a requirement that a bell shall be rung or whistle sounded on approaching a highway, or gates or signs erected, or flagmen stationed at crossings. These regulations being clearly intended for the protection of travelers, it is well settled that any violation of them is competent evidence of negligence, in an action brought by a traveler on the highway, even though the statute or ordinance simply imposes a penalty for its violation.¹ The *dictum* to

³ In *Vermont*, the statute (R. S. 1894, § 3871) is intended to secure the safety of passengers as well as that of animals (*Wait v. Bennington*, etc. R. Co., 61 Vt. 268; 17 Atl. 284). See also *Hynes v. San Francisco*, etc. R. Co., 65 Cal. 316. So in *New York*, a railroad servant may recover for injuries suffered on a train derailed by cattle wandering on an unfenced track (*Donnegan v. Erhardt*, 119 N. Y. 468; 23 N. E. 1051; overruling *Langlois v. Buffalo*, etc. R. Co., 19 Barb. 364). So in *Missouri* (*Dickson v. Omaha*, etc. R. Co., 124 Mo. 140; 27 S. W. 476; *Atchison*, etc. R. Co. v. *Reesman*, 60 Fed. 370; 9 C. C. A. 20).

⁴ *Hayes v. Michigan Central R. Co.*, 111 U. S. 228; 4 S. Ct. 369; *Keyser v. Chicago*, etc. R. Co., 66 Mich. 390; 33 N. W. 867; *Stuettgen v. Wisconsin Cent. R. Co.*, 80 Wisc. 498; 50 N. W. 407; *Chicago*, etc. R. Co. v.

Grablin, 38 Neb. 90; 56 N. W. 796. To the contrary, *Fitzgerald v. St. Paul*, etc. R. Co., 29 Minn. 336; 13 N. W. 163. Compare *Morrissey v. Providence*, etc. R. Co., 15 R. I. 271; 3 Atl. 10.

¹ See § 13, *ante*. So held as to statutes (*Union Pac. R. Co. v. McDonald*, 152 U. S. 262; 14 S. Ct. 619). "The running of railroad trains, within the limits of a city, at a rate of speed greater than is allowed by an ordinance of said city . . . is always to be considered by the jury as at least a circumstance from which negligence may be inferred" (*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 418; 12 S. Ct. 679). To same effect, *Union Pac. R. Co. v. Rassmussen*, 25 Neb. 810; 41 N. W. 778; *Blanchard v. Lake Shore*, etc. R. Co., 126 Ill. 416; 18 N. E. 799; *Meloy v. Chicago*, etc. R. Co., 77 Iowa, 743; 42 N. W. 563; *Savannah*, etc. R. v. *Flannagan*, 82

the contrary, in a New York case,² which we criticised at some length in former editions of this work, is now so completely exploded as to need little notice. Statutes and valid municipal ordinances stand upon the same footing in this respect.³ The only question remaining open on this point is whether conclusive proof of the violation of such a statute or ordi-

Ga. 579; 9 S. E. 471; *Peyton v. court, three judges dissenting, was Texas, etc. R. Co.*, 41 La. Ann. 861; 6 justly condemned by Davis, J., in So. 690; *McGrath v. N. Y. Central R. Jetter v. Harlem R. Co.*, 2 Abb. Ct. Co., 63 N. Y. 522; *Massoth v. Dela- App. 458. It is now completely ware, etc. Canal Co.*, 64 Id. 524; overruled (*Massoth v. Delaware, etc. Clark v. Boston & Me. R. Co.*, 64 Canal Co., 64 N. Y. 524). N. H. 323; 10 Atl. 676; *Wright v.* ³ See § 13, *ante*, also note 1, *supra*. Malden, etc. R. Co., 4 Allen, 283; Where, for a long distance, platted Langhoff v. Milwaukee, etc. R. Co., streets were not opened across the 19 Wisc. 489; *Hoppe v. Chicago, track, and the right of way was etc. R. Co.*, 61 Id. 357; 21 N. W. fenced on both sides, it is immaterial 227; *Pennsylvania Co. v. Conlan*, 101 whether or not defendant's train Ill. 93; *Cleveland, etc. R. Co. v. was running in violation of an ordi- Baddeley*, 150 Id. 328; 36 N. E. 965; nance limiting the speed of trains Illinois Central R. Co. v. *Murphy*, 52 within the city to six miles an hour, Ill. App. 65; *Faber v. St. Paul, etc. because, as to the place of the acci- R. Co.*, 29 Minn. 465; 13 N. W. 902; dent, the ordinance was unreasonable Robertson v. *Wabash, etc. R. Co.*, and void (*Burg v. Chicago, etc. R. Co.*, 90 Iowa, 106; 57 N. W. 680). 84 Mo. 119; *Keim v. Union R. etc. The running of a dummy locomotive Co.*, 90 Mo. 314; 2 S. W. 427). So as backward at a greater rate of speed to statutes or ordinances requiring than that prescribed by a city ordi- flagmen at crossings (*Pennsylvania nance was a violation thereof, Co. v. Hensil*, 70 Ind. 569; *Chicago, though the speed was within the etc. R. Co. v. Starmer*, 26 Neb. 630; limitation for running forward, and 42 N. W. 706). In Michigan, the it was safer to run backward than absence of a flagman is no evidence forward (*Highland Ave. etc. R. Co. of negligence, unless the necessity v. Sampson*, Ala. ; 20 So. 566). for maintaining such flagman at the A city ordinance forbidding running particular crossing has been deter- any train or cars through the city at mined by the railroad commissioner, to a greater rate of speed than that to whom the question is left by statute named in the ordinance applies (*Battishill v. Humphrey*, 64 locomotives running without any Mich. 494; 31 N. W. 894). It is cars attached (*East St. Louis Con- obvious that an ordinance limiting necting R. Co. v. O'Hara*, 150 Ill. the speed of the trains of one com- 580; 37 N. E. 917). Railroad com- pany is not evidence of negligence panies and their employees using rail- against another (*Fell v. Burlington, ways in a city must take notice of all etc. R. Co.*, 43 Iowa, 177). valid city ordinances duly promul- gated (*Central R. Co. v. Brunswick, etc. R. Co.*, 87 Ga. 386; 13 S. E. 520).

² *Brown v. Buffalo, etc. R. Co.*, 22 N. Y. 191. This decision, which was rendered by a bare majority of the

nance is also conclusive proof of negligence. Some courts have held that it is, and some that it is not.⁴ But the true rule is really perfectly plain. The violation of such a law, if left without explanation or excuse, is conclusive proof of *negligence*, but it may be excused, or it may afford no proof at all that this negligence was the cause of the plaintiff's injury.⁵ If it is proved that, as a proximate consequence of such negligence, the plaintiff was injured, without contributory negligence,⁶ the jury have no right to find for the defendant.⁷ If this is the only negligence proved against the defendant, and it did not proximately contribute to the plaintiff's injury, the jury have no right to find for the plaintiff.³ Or if some

⁴ That it is, was held in *Virginia, etc. R. Co. v. White*, 84 Va. 498; 5 S. E. 573; *Houston, etc. R. Co. v. Wilson*, 60 Tex. 142; *Pittsburgh, etc. R. Co. v. Knutson*, 69 Ill. 103; *Toledo, etc. R. Co. v. O'Connor*, 77 Id. 391; *Piper v. Chicago, etc. R. Co.*, 77 Wisc. 247; 46 N. W. 165; *Murray v. Mo. Pacific R. Co.*, 101 Mo. 236; 13 S. W. 817; *Schlereth v. Mo. Pacific R. Co.*, 115 Mo. 87; 21 S. W. 1110; and in *Georgia, Indiana* and other cases, cited under § 13, *ante*. That it is *not*, was held in *Moore v. Gadsden*, 93 N. Y. 12; *McRickard v. Flint*, 114 N. Y. 222; 21 N. E. 153; *Connor v. Electric Tr. Co.*, 173 Pa. St. 602; 304 Atl. 238; *Beck v. Portland, etc. R. Co.*, 25 Oreg. 32; 34 Pac. 753. But see *Zwack v. N. Y. Lake Erie, etc. R. Co.*, 8 N. Y. App. Div. 483; 40 N. Y. Supp.

⁵ See § 27, *ante*.

⁶ See § 472, *post*.

⁷ *Houston, etc. R. Co. v. Nixon*, 52 Tex. 19. In this case, the court said, "If, by the charge, it was intended to instruct the jury that the failure to ring the bell was negligence, and that if by reason thereof the deceased was not aware of the approach of the train, and the injury resulted from this negligence as the proximate cause, then this was the true construction of the statute."

⁸ *Chrystal v. Troy, etc. R. Co.*, 124 N. Y. 519; 26 N. E. 1103 [child 17 months old injured by train]. If a person approaching a crossing sees it and the arriving train, the absence of a sign and flagman and light does not make the company liable (*Pakalinsky v. N. Y. Central R. Co.*, 82 N. Y. 424). Where the engineer fails to ring or whistle, it is for plaintiff to show that such neglect caused the injury (*Braxton v. Hannibal, etc. R. Co.*, 77 Mo. 455; *Wallace v. St. Louis, etc. R. Co.*, 74 Id. 594; *Holman v. Chicago, etc. R. Co.*, 62 Id. 562; *Chicago, etc. R. Co. v. Carpenter*, 45 Ill. App. 294; *Leavitt v. Terre Haute, etc. R. Co.*, 15 Ind. App. 513; 31 N. E. 860; 32 Id. 866; *Atchison, etc. R. Co. v. Walz*, 40 Kans. 433; 19 Pac. 787; *Gulf, etc. R. Co. v. Greenlee*, 62 Tex. 344; *Vicksburg, etc. R. Co. v. Hart*, 61 Miss. 468; see *Hawker v. Baltimore, etc. R. Co.*, 15 W. Va. 628; *Pike v. Chicago, etc. R. Co.*, 39 Fed. 754). So where an animal was killed by a train moving at unlawful speed, company held not liable, because a lower rate of speed would have been unavailing to prevent the accident (*Flattes v. Chicago, etc. R. Co.*, 35 Iowa, 191; *Evans, etc. Brick Co. v. St. Louis, etc. R. Co.*, 17 Mo. App. 624).

good excuse appears, which would be a sufficient defense to an action for the penalty imposed by the law, or which would show greater care in technical violation of the law than in obeying it, then the law is not really violated.⁹ We find but few cases in which this is clearly stated; but they deserve to take precedence of all the others, as they reconcile the principles upon which the others were actually decided. Statutes and ordinances of this kind are certainly not the exclusive measure of the duties of a railroad company in such situations; and it is not necessarily absolved from blame by showing that it complied with all statutory regulations; since, while doing so, it may have neglected its common-law duties.¹⁰ But in the absence of special circumstances, the statutory duty thus imposed is the sole measure of obligation as to that particular precaution. Thus, it cannot usually be left to a jury to say that other signals should be required, where the statute defines those which are to be given.¹¹ And if the statute deposes

⁹ "The mere fact that the car was driven at a rate of speed forbidden by the city ordinance, would not be conclusive proof of negligence. The speed complained of may have occurred without the fault of the driver, or may have been justified by some reasonable necessity, etc. It is not true that if an unlawful rate of speed contributed to the injury, that alone would give the plaintiff a right to recover if he was without fault" (*Hanlon v. South Boston R. Co.*, 129 Mass. 310). If after the engineer saw that plaintiff was about to cross, he was putting forth other exertions to save plaintiff, and on account of them had not time to have the whistle sounded, his failure to do so would not constitute negligence (*Heddles v. Chicago, etc. R. Co.*, 74 Wisc. 239; 42 N. W. 237).

¹⁰ *Linfield v. Old Colony R. Co.*, 10 Cush, 562; *Bradley v. Boston & Maine R. Co.*, 2 Id. 539; *South, etc. Ala. R. Co. v. Thompson*, 62 Ala. 494.

¹¹ *Thompson v. N. Y. Central R.*

Co., 110 N. Y. 636; 17 N. E. 690; *Vanderwater v. N. Y. & New England R. Co.*, 135 N. Y. 583; 32 N. E. 636; *Chicago, etc. R. Co. v. Perkins*, 125 Ill. 127; 17 N. E. 1; *Piper v. Chicago, etc. R. Co.*, 77 Wisc. 247; 46 N. W. 165. The number and kind of signals required to be given on approaching a crossing depend upon the character of the crossing, the speed of the train, and the surrounding circumstances; the statute requiring the giving of certain signals not being intended to furnish a standard by which to determine in every case whether the company has fully discharged its duty in respect to giving sufficient warning, but rather to prescribe the minimum of care which should be observed in all cases (*Missouri Pac. R. Co. v. Moffatt*, 56 Kans. 667; 44 Pac. 607). To similar effect, *Atchison, etc. R. Co. v. Hague*, 54 Kans. 284; 38 Pac. 257; *Coulter v. Great Northern R. Co.*, 5 N. D. 568; 67 N. W. 1046; *English v. Southern Pac. Co.*, 13 Utah, 407; 45 Pac. 47. It is not neces-

authority over the matter to certain officials, their regulation is final.¹² It is no excuse for the company that the violation of statute, etc., was the act of servants, contrary to express orders,¹³ or even maliciously done.

§ 468. **Omission to ring or whistle at crossings.**—Statutes in nearly every state¹ require steam railroad companies to ring the bell, or sound a whistle, or both,² upon their engines for a

sarily sufficient for the whistle and bell of a train to be sounded at the distance from a grade crossing prescribed by statute; but such reasonable precautions must be taken as are necessary to avoid risk (Chicago, etc. R. Co. v. Netolicky, 67 Fed. 665; 14 C. C. A. 615). A railway company may be guilty of negligence by not placing a sign of warning, or sounding a whistle, at a crossing, though not required to do so by statute (Winstanley v. Chicago, etc. R. Co., 72 Wisc. 375; 39 N. W. 856).

¹² See § 468, *post*.

¹³ So held, as to railroad commissioners, dispensing with whistling at certain crossings (Rowen v. N. Y., New Haven, etc. R. Co., 59 Conn. 364; 21 Atl. 1073). A company operating its line in a city under a statute authorizing it to do so, subject to such regulations as to rate of speed and public safety as the common council shall prescribe, is under no obligation to give the ordinary signals when that board has not so directed (Heaney v. Long Island R. Co., 112 N. Y. 122; 19 N. E. 432). Where the train is run through a city at a rate of speed forbidden by charter, it is no defense to an action against the company that the violation was committed by the company's servants without its consent, and contrary to its orders (Buffalo v. N. Y. Lake Erie, etc. R. Co., 23 N. Y. S. 303).

¹ Such statutes, in slightly different form, have existed in every state, almost ever since steam railroads were introduced. In New York, the statute was repealed by mistake, by Laws 1886, ch. 593 (Vandewater v. N. Y. & New England R. Co., 135 N. Y. 583; Lewis v. N. Y., Lake Erie, etc. R. Co., 123 N. Y. 496; 26 N. E. 357), but was re-enacted in 1890, ch. 565. Meanwhile, it was for a jury in each case to decide whether such signals should be required; and they were at liberty to find that, in view of the locality and speed of the train, the warning should have been given at even a greater distance than that which the statute prescribed (Lewis v. N. Y., Lake Erie, etc. R. Co., *supra*; Friess v. N. Y. Central R. Co., 67 Hun 205; 22 N. Y. Supp. 104), although their omission was not negligence, as matter of law (Vandewater v. N. Y. & New England R. Co., *supra*).

² Generally, the statute only requires the bell to be rung *or* whistle sounded, and where that is the case, only one of these signals need be used (Tyler v. Old Colony R. Co., 157 Mass. 336; 32 N. E. 227; Missouri, etc. R. Co. v. Kirchoffer, Tex. Civ. App.; 24 S. W. 577; but compare Bates v. N. Y. & New England R. Co., 60 Conn. 259; 22 Atl. 538. In some states, *both* signals are required, *e. g.*, Indiana (R. S. 1881. § 4020), and Iowa (Laws 1884, ch. 104, § 1).

specified distance (usually eighty rods), before reaching a crossing on a level with "any *traveled* public road or street,"³ or in other states, any "highway crossing."⁴ And this must be done almost, if not quite, continuously.⁵ There is no requirement that the bell shall be rung *after* making the crossing.⁶ An omission thus to ring the bell at such a crossing, therefore, is negligence, and is sufficient to sustain a verdict in favor of one who was injured thereby,⁷ whether the statute

³ It is not enough to bring it within such a statute that the road is dedicated as a highway. It must be in actual use as a *traveled* road (*Byrne v. N. Y. Central R. Co.*, 94 N. Y. 12). See also *Cordell v. N. Y. Central R. Co.*, 64 Id. 535. A "traveled place" means a place where the public have a legal right to cross the track, and not every place where people are accustomed to cross (*Barber v. Richmond, etc. R. Co.*, 34 S. C. 444; 13 S. E. 630; *Hankinson v. Charlotte, etc. R. Co.* 41 S. C. 1; 19 S. E. 206). A switch-crossing provided by a company across its own ground for ingress to its depot is not a "traveled public road," and a failure to ring or whistle at such a crossing is not a violation of the act, though it may be negligence at common law, and that is for the jury to determine (*Hodges v. St. Louis, etc. R. Co.*, 71 Mo. 50; *Bauer v. Kansas Pacific R. Co.*, 69 Id. 219).

⁴ Such statutes apply to cities, as well as to the country (*Mobile, etc. R. Co. v. Davis*, 130 Ill. 146; 22 N. E. 850; *Pennsylvania Co. v. Backes*, 133 Ill. 255; 24 N. E. 563). Under the Georgia Code § 710, it is unlawful to blow a whistle on approaching crossings within the corporate limits of cities and villages, and companies are required to ring their locomotive bells instead. See *Georgia R. Co. v. Carr*, 73 Ga. 557. As to Kansas, see *Clark v. Missouri Pac. R. Co.*, 35 Kans. 350; 11 Pac. 134.

⁵ *Chicago, etc. R. Co. v. Triplett*, 38 Ill. 482; *Chicago, etc. R. Co. v. McDaniels*, 63 Id. 122; per *Sharswood, J.*, *Pennsylvania R. Co. v. Ackerman*, 74 Pa. St. 265. Merely blowing the whistle once is not a compliance with the requirement that the whistle shall be sounded "at intervals until it shall have crossed such road or street" (*Louisville, etc. R. Co. v. Howard*, 90 Tenn. 144; 19 S. W. 116; *McCallum v. Long Island R. Co.*, 38 Hun, 569). An instruction to the jury that "they must do the one or the other, and do it continuously," was held to be substantially correct (*Smedis v. Brooklyn, etc. R. Co.*, 88 N. Y. 13; *Texas, etc. R. Co. v. Spradling*, 18 C. C. A. 496; 72 Fed. 152; *Lapsley v. Union Pac. R. Co.*, 50 Fed. 172). The contrary has been adjudged under the statute of Kentucky (*Paducah, etc. R. Co. v. Hoehl*, 12 Bush, 41). Merely whistling once or twice will not do (*Petrie v. Columbia, etc. R. Co.*, 29 S. C. 303; 7 S. E. 515).

⁶ *Grippen v. N. Y. Central R. Co.*, 40 N. Y. 34. See § 471, *post*.

⁷ *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 35; *Renwick v. N. Y. Central R. Co.*, 36 Id. 132; *Voak v. Northern Central R. Co.*, 75 Id. 320; *Galena, etc. R. Co. v. Dill*, 22 Ill. 264; *Wright v. Malden, etc. R. Co.*, 4 Allen, 283; *Augusta, etc. R. Co. v. McElmurry*, 24 Ga. 75; see *Linfield v. Old Colony R. Co.*, 10 Cush. 562; *St. Louis, etc. R. Co. v. Mathias*, 50 Ind. 65; *Lake Erie, etc. R. Co. v.*

does⁸ or does not⁹ expressly provide that the company shall be liable for damages resulting therefrom. But unless the injury was caused by the omission to give the signal, it is not enough in itself to sustain a verdict against the railroad company.¹⁰ The statutes generally require a bell to be upon the engine only; and therefore, even when a train is backing down, neither court nor jury can say that another bell should have been rung on the rear car.¹¹ As already stated, these statutes are not the exclusive test of care and negligence.¹² If a railroad company makes it a custom to sound the engine-bell at other places or for a greater distance than any statute requires,¹³ or if it establishes automatic signal bells at a station,¹⁴ the omission of such signals is evidence of negligence. But where the statute provides for the whole case, the courts may not leave the jury to require greater care than the statute does.¹⁵

Zoffinger, 107 Ill. 199. It is negligence, but not presumptively *gross* negligence (Leavenworth, etc. R. Co. v. Rice, 10 Kans. 426). It was held to be gross negligence not to sound whistle or ring bell where the crossing was in a cut and was approached by descending a hill, and persons approaching it could not see the track until within a few feet of it, owing to brush and brushes (Indianapolis, etc. R. Co. v. Stables, 62 Ill. 313). Violation of the statute is negligence *per se* (Ensley R. Co. v. Chewning, 93 Ala. 24; 9 So. 458; Nuzum v. Pittsburgh, etc. R. Co., 30 W. Va. 228; 4 S. E. 242; Terre Haute, etc. R. Co. v. Voelker, 129 Ill. 540; 22 N. E. 20). See further, under § 467, note 4.

⁸ Gulf, etc. R. Co. v. Breitling, [Tex.] 12 S. W. 1121; Bitner v. Utah Central R. Co., 4 Utah, 502; 11 Pac. 620. So in the New York cases.

⁹ Failure to comply with the law creates a liability for damages caused thereby, notwithstanding, in the Revision of 1874, the provision of the law of 1849, declaring a railroad company liable for all damages sus-

tained by reason of such neglect was omitted (Ohio, etc. R. Co. v. Reed, 40 Ill. App. 47).

¹⁰ Galena, etc. R. Co. v. Dill, 22 Ill. 264; Indianapolis, etc. R. Co. v. Blackman, 63 Id. 117. The jury may excuse the omission, as prudent under special circumstances (Wakefield v. Connecticut, etc. R. Co., 37 Vt. 330). In Missouri, under Rev. St. 1889, § 2608, in the absence of such signals, the burden of proof as to the cause of the injury is on the company (Crumpley v. Hannibal, etc. R. Co., 111 Mo. 152; 19 S. W. 820).

¹¹ Wilson v. Rochester, etc. R. Co., 16 Barb. 167.

¹² See § 467, *ante*.

¹³ See § 464, *ante*, note 9.

¹⁴ Where electric bells are placed at a railroad crossing to signal approaching trains, failure of the bells to ring is evidence of negligence in the company (Hicks v. N. Y., New Haven, etc. R. Co., 164 Mass. 424; 41 N. E. 721).

¹⁵ Toledo, etc. R. Co. v. Cline, 135 Ill. 41; 25 N. E. 846; Hollender v. N. Y. Central R. Co., 14 Daly, 219; 19 Abb. N. C. 18.

Thus, where a statute requires a bell to be rung *or* a whistle sounded, a jury cannot be permitted to require both signals to be made at the same time,¹⁶ nor to require unconditionally that the signals shall be so made, that the injured person should actually hear them.¹⁷ Where no statute exists, a jury may, within reasonable limits, to be approved by the court, determine what signals should be given at lawful crossings.¹⁸

§ 469. Presumptions in such cases.—When a human

¹⁶ See note 2, *supra*.

¹⁷ If there is a bell on an engine of the statutory weight, and it is rung in the manner required, the company has performed its duty, whether the signal is heard or not by a person crossing the track on the highway (*N. Y., Lake Erie, etc. R. Co. v. Leaman* [Ct. Errors], 54 N. J. Law, 202; 23 Atl. 691; *Chicago, etc. R. Co. v. Dougherty*, 110 Ill. 521; *s. p.*, *Chicago, etc. R. Co. v. Robinson*, 106 Id. 142).

¹⁸ The court in its charge assumed, as matter of law, the existence of a duty upon defendant to have blown a whistle, or rung a bell, 80 rods before the train reached the crossing, although the statute requiring such signals had been repealed by Laws 1886, ch. 593. Held, that the mistake was beneficial to defendant, as, in the absence of the statute, the jury might have said that, in view of the locality and the speed of the train, the signals should have been given at a greater distance than 80 rods from the crossing (*Lewis v. N. Y., Lake Erie, etc. R. Co.*, 123 N. Y. 496; 26 N. E. 357). Defendant's train was running at an unusual time and at a high rate of speed, without giving the signals on approaching the crossing which were customary. The view of the track at the crossing was obstructed by high banks, on which bushes were growing. Held, that defendant was

guilty of negligence, though signals on approaching the crossing were not required by any statute (*Vanderwater v. N. Y. & New England R. Co.*, 74 Hun, 32; 26 N. Y. Supp. 397). In *Indiana*, Rev. St. 1881, § 4020, provides that, where a locomotive engine approaches a highway crossing, the whistle shall be sounded and the bell rung continuously until the engine shall have passed the crossing. Though this statute does not apply to a train of cars without an engine, those in charge of such a train will not be relieved from the obligation of taking other proper precautions (*Ohio, etc. R. Co. v. McDanel*, 5 Ind. App. 108; 31 N. E. 836). A city ordinance prescribing precautions to be observed by railway companies at public crossings, does not relieve the companies from the observance of ordinary care in particulars not mentioned in the ordinance (*Wilkins v. St. Louis, etc. R. Co.*, 101 Mo. 93; 13 S. W. 893). Although the provision of the statute, requiring the ringing of bells on crossings, did not apply in cities, yet the fact that no bell was rung on a steam-car passing along a city street might be shown in an action for negligence, in order to prove a failure to use proper care and diligence in managing the train (*Cumming v. Brooklyn R. Co.*, 38 Hun, 362).

being has been injured at a railroad crossing, there is a reasonable presumption that the warning conveyed by the sound of a bell or whistle would have been beneficial to him; and, therefore, in such a case, it may be presumed that his injury was caused by the omission of such signals, if they were omitted.¹ But if, without these signals, the injured person knew, or, by the exercise of ordinary care, would have known, of the proximity and approach of the train, this presumption is rebutted; and, without further evidence connecting the omission of signals with the injury, the company is not responsible for it on that ground alone.² If there is an omission to ring the bell or sound the whistle, and an injury is occasioned thereby, the burden is upon the company to show that such omission was reasonable and prudent, in view of the actual condition of things at the time,³ as, for, example, that such noises were so frequent as to make them practically of no value as a warning, and that a better system of signals was in use.⁴ Where, as in Tennessee, the statute requires the signal to be given when some person or animal, etc., appears upon the road, the railroad company is not in fault for omitting such signal when it could not be given in time to prevent injury, by reason of a person's sudden appearance upon the road,⁵ or

¹ *Huckshold v. St. Louis, etc. R. Co.*, 90 Mo. 548; 2 S. W. 794. It is a question for the jury (*Doyle v. Boston, etc. R. Co.*, 145 Mass. 386; 14 N. E. 461). But see *Galena, etc. R. Co. v. Loomis*, 13 Ill. 548. In *Beisiegel v. N. Y. Central R. Co.* (34 N. Y. 622), the plaintiff sued for negligently running a steam-engine against him while crossing the track on a city street. No signals were made and no bell rung. Morgan, J., said: "The very object of requiring the engineer to sound an alarm before reaching the crossing is to put the way-traveler upon his guard; and when the engineer neglects the necessary signals, he deprives the traveler of one of the means upon which he has a right to rely for pro-

tection against the danger of a collision." On another appeal, held that plaintiff ought not to recover (40 N. Y. 9). Compare *Havens v. Erie R. Co.*, 41 Id. 296; and *Cosgrove v. N. Y. Central R. Co.*, 87 Id. 88.

² *Steves v. Oswego, etc. R. Co.*, 18 N. Y. 422; *Brooks v. Buffalo, etc. R. Co.*, 25 Barb. 600; *Dascomb v. Buffalo, etc. R. Co.*, 27 Id. 221; *Telfer v. Northern R. Co.*, 30 N. J. L. 188.

³ *Wakefield v. Connecticut, etc. R. Co.*, 37 Vt. 330. See § 429, *ante*.

⁴ *Speed v. Atlantic, etc. R. Co.*, 71 Mo. 303.

⁵ *East Tennessee, etc. R. Co. v. Scales*, 2 Lea, 688. See *Parker v. Wilmington, etc. R. Co.*, 86 N. C. 221.

by his concealment from view by a rock on a sharp curve,⁶ or by fog or rain.⁷

§ 470. Who entitled to benefit of statutes.—Statutes, requiring signals at crossings, are enacted only for the benefit of persons intending to cross the track at a lawful crossing, or proceeding on a highway, parallel with the track. Persons walking along the track¹ or trespassing thereon,² or occupied in work upon adjoining land³ are not entitled to the benefit of such statutes, whatever may be their common-law rights. But one who crosses the railroad on an open space or private way adjoining the highway, is entitled to the benefit of the statute.⁴ The hazards intended to be provided against by these statutes were (1) actual collision at crossings, and (2) frightening teams upon the highway near such crossings;⁵ and if the failure to

⁶ *East Tennessee, etc. R. Co. v. Swaney*, 5 Lea, 119; *East Tennessee, etc. R. Co. v. White*, Id. 540.

⁷ *Louisville, etc. R. Co. v. Melton*, 2 Lea, 262.

¹ *Harty v. Central R. Co.*, 42 N. Y. 468; *O'Donnell v. Providence, etc. R. Co.*, 6 R. I. 211; *Spicer v. Chesapeake, etc. R. Co.*, 34 W. Va. 514; 12 S. E. 553; *Chicago, etc. R. Co. v. Eininger*, 114 Ill. 79; 29 N. E. 196. Omission to provide a flagman at a crossing, and to ring the engine bell when approaching it, do not constitute negligence, as against a person who is walking along the track, since such precautions are for the sole benefit of those about to cross the track (*Roden v. Chicago, etc. R. Co.*, 133 Ill. 72; 24 N. E. 425). But in Georgia it is held, that while the use of the bell or whistle on approaching public crossings, is exacted primarily for the benefit of persons crossing the track, and not for those walking along it, yet relatively to the latter, as well as the former, a failure to comply with the statute is evidence of negligence (*Central R. Co. v. Raiford*, 82 Ga. 400; 9 S. E. 169; *S. P., Georgia R. Co. v. Daniel*, 89 Ga. 463; 15 S. E. 538).

² *Shackleford v. Louisville, etc. R. Co.*, 84 Ky. 43. Where the only negligence imputable to the railroad company is the failure of its engineer to give the statutory signal for a public crossing, it is not liable for injuries to a person who, without license, is on the track between such crossing and the place where such signal should have been given (*Atlanta, etc. R. Co. v. Gravitt*, 93 Ga. 369; 20 S. E. 550).

³ *Williams v. Chicago, etc. R. Co.*, 135 Ill. 491; 26 N. E. 661.

⁴ Persons lawfully using a private crossing in the vicinity of a public crossing are entitled to the benefit of signals which they know it is the duty and custom of the railroad to give at the public crossing (*Cahill v. Cincinnati, etc. R. Co.*, 92 Ky. 345; 18 S. W. 2). See *Cranston v. N. Y. Central R. Co.*, 57 Hun, 590; 11 N. Y. Supp. 215 [deceased killed on private way near street crossing, entitled to statutory signals]. In *Toledo, etc. R. Co. v. Fergusson* (42 Ill. 449), this principle is applied to the case of an animal.

⁵ *Per Allen, J., People v. N. Y. Central R. Co.*, 25 Barb. 199; approved, *Harty v. Central R. Co.*,

give such signals, when approaching a crossing, causes an injury to persons driving, in the exercise of proper care, on a highway running parallel with the track, the company will be liable.⁶ Servants of the company are entitled to the benefit of these statutes.⁷

§ 471. **Trains running backwards.**—For obvious reasons trains are usually *drawn* by engines, instead of being *pushed* by them. All the ordinary rules governing the operation of railroads, whether imposed by statute or evolved from experience by judicial decisions, are based on the assumption that trains will be so run. Travelers have a right to assume that this course will be followed, until they can see that, in any particular case, an exception is made. The necessities of railroad business require such exceptional cases to occur; and therefore the mere fact that a train was running backward is not, of itself, any evidence of negligence.¹ Nor does the backward motion of a train alter or enlarge the statutory rule concerning signals. If the statute only requires a bell on the engine, the movement of a train backward does not authorize a court or jury to say that another bell ought to have been put upon the rear car; and the ringing of the engine bell is a full compliance with the statute.² But a watchman must be put upon the rear car, to look for and warn travelers,³ and sig-

42 N. Y. 468. The point was expressly held in *Norton v. Eastern R. Co.*, 113 Mass. 366; see also *Pollock v. Eastern R. Co.*, 124 Id. 158; *Missouri Pac. R. Co. v. Johnson*, 44 Kans. 660; 24 Pac. 1116. Otherwise under South Carolina statute (*Whilston v. Richmond, etc. R. Co.*, 57 Fed. 551).

⁶ *Ransom v. Chicago, etc. R. Co.*, 62 Wisc. 178; 22 N. W. 147. *Contra*, see *East Tennessee, etc. R. Co. v. Feathers*, 10 Lea, 103; *Louisville, etc. R. Co. v. Lee*, 47 Ill. App. 384; *Reynolds v. Great Northern R. Co.*, 16 C. C. A. 435; 69 Fed. 808.

⁷ *Illinois Central R. Co. v. Gilbert*, 157 Ill. 354; 41 N. E. 724.

¹ *Sullivan v. Pennsylvania Co. [Pa.]*, 7 Atl. 177; *Carr v. North River*

Const. Co., 48 Hun, 266. A railroad company is not liable for the death of a person on its track, where the only negligence shown is the fact that the train was, at the time, running backwards at the rate of twenty-five miles an hour (*Swindell v. Chicago, etc. R. Co.*, 44 Neb. 841; 62 N. W. 1103). The general rule is implied in all the cases cited under this section.

² *Grippen v. N. Y. Central R. Co.*, 40 N. Y. 34. But there was a dispute as to whether a bell was rung, or other warning given.

³ *Duame v. Chicago, etc. R. Co.*, 72 Wisc. 523; 40 N. W. 394; *Whalen v. Chicago, etc. R. Co.*, 75 Wisc. 654; 44 N. W. 849; *Bergman v. St. Louis, etc. R. Co.*, 88 Mo. 678; 1 S. W. 384

nals of the movement must be given.⁴ And, at night, a light must be put upon that car, sufficient to warn travelers crossing

[no lookout or signals]; *Hamilton v. Morgan's R. Co.*, 42 La. Ann. 824; 8 So. 586; *Robinson v. West. Pacific R. Co.*, 48 Cal. 409; *Cheney v. N. Y. Central R. Co.*, 16 Hun, 415. In *Rogers v. Rhymney R. Co.* (26 L. T. N. S. 879), deceased was struck by a train driven suddenly backwards, without warning. The court said: "There was evidence of negligence in the fact that the fireman only, and not the engine driver, was on the engine, and that there was no guard at the end of the train to see that the line was clear, before the train was shunted backwards." A finding of gross negligence was sustained where a train was run backward over a crossing with the brake on the engine out of repair, no brakemen at the other brakes, no flagman or other person at rear of train or elsewhere, except on the engine, with no whistling, but with ringing of bell, along a track which, from the engine, could not be seen for a distance of from forty to fifty feet from the rear of the train (*Kansas Pacific R. Co. v. Pointer*, 14 Kans. 37). S. P., *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279, 31 N. W. 275. The failure of a flagman to give warning of the approach of a backing engine is negligence (*Finklestein v. N. Y. Central R. Co.*, 41 Hun, 34). S. P., *McGovern v. N. Y. Central R. Co.*, 67 N. Y. 417; *Cooper v. Lake Shore, etc. R. Co.*, 66 Mich. 261; 33 N. W. 306; *Louisville, etc. R. Co. v. Potts*, 92 Ky. 30; 17 S. W. 185 [servant struck by car with no lookout or warning].

⁴ *Robinson v. Western Pacific R. Co.*, 48 Cal. 409; *Virginia M. R. Co.*

v. White, 84 Va. 498; 5 S. E. 573; *Louisville, etc. R. Co. v. Thompson*, 64 Miss. 584; 1 So. 840 [passenger]; *Abbitt v. Lake Erie, etc. R. Co.* [Ind.] 40 N. E. 40 [inspector examining car]. A company which leaves cars upon a side track to be unloaded by the owners of the freight, cannot run or back its cars upon such side track while the cars are being unloaded, without special notice or warning (*Chicago, etc. R. Co. v. Goebel*, 119 Ill. 515; 10 N. E. 369, citing *Noble v. Cunningham*, 74 Ill. 51; *North Chicago, etc. Mill Co. v. Johnson*, 114 Id. 57; *Illinois, etc. R. Co. v. Hoffman*, 67 Id. 287; *Newson v. N. Y. Central R. Co.*, 29 N. Y. 383; *Stinson v. N. Y. Central R. Co.*, 32 Id. 333). To same effect, *Gessley v. Missouri Pac. R. Co.*, 32 Mo. App. 413 [injured person loading another car]; *Toledo, etc. R. Co. v. Hauck*, 8 Ind. App. 367; 35 N. E. 573 [same]; *Jacobson v. St. Paul, etc. R. Co.*, 41 Minn. 206; 42 N. W. 932 [same]; *International, etc. R. Co. v. Neira*, Tex. Civ. App. ; 28 S. W. 95 [same; unloading]. It is a breach of duty to back a train of flat cars over a crossing in the suburbs of a city on a dark night without having on it any brakeman, light, or other signal (*Chicago, etc. R. Co. v. Sharp*, 63 Fed. 532; 11 C. C. A. 337). The court is not bound to charge, that if the bell was rung, that was a sufficient warning, but it was a question for the jury whether such warning was given as was proper and reasonable under the circumstances (*Byrne v. N. Y. Central R. Co.*, 104 N. Y. 362; 10 N. E. 539).

the track at lawful places, of the approach of the train.⁵ Such a movement calls for the exercise of care suited to the peculiar circumstances.⁶ If, however, none of these precautions would have helped to avoid the injury, their omission is immaterial.⁷

§ 472. **Contributory negligence.** — The general rules as to the effect of contributory negligence in depriving an injured person of his right to recover damages, have been stated elsewhere.¹ His failure to use ordinary care will have this effect,² if it proximately contributed to the injury, but not otherwise;³ and he is not required to use extraordinary care.⁴ The

⁵ Backing a train across a city street in the dark without having a conspicuous light on the rear car so as to show in what direction the train is moving, as required by an ordinance of the city, is negligence (*Chicago, etc. R. Co. v. Walsh*, 157 Ill. 672; 41 N. E. 900). *s. p.*, *Bohan v. Milwaukee, etc. R. Co.*, 58 Wisc. 30.

⁶ *Illinois Cent. R. Co. v. Larson*, 152 Ill. 326; 38 N. E. 784; *Romick v. Chicago, etc. R. Co.*, 62 Iowa, 167.

⁷ *Moore v. Gt. Northern R. Co.*, Minn. ; 69 N. W. 1103.

¹ Chapter VI, *ante*.

² *Jenkins v. Central R. Co.*, 89 Ga. 756; 15 S. E. 655. A traveler in crossing a railroad is required to exercise that degree of care which "an ordinarily prudent person" would exercise under like circumstances, and not any higher or lower (*Chicago, K. etc. R. Co. v. Fisher*, 49 Kans. 460; 30 Pac. 462; *Burke v. N. Y. Central R. Co.*, 73 Hun, 32; 25 N. Y. Supp. 1009; *Galveston, etc. R. Co. v. Matula*, 79 Tex. 577; 15 S. W. 573; *Easley v. Missouri Pac. R. Co.*, 113 Mo. 236; 20 S. W. 1073; *White v. Vicksburg, etc. R. Co.*, 42 La. Ann. 990; 8 So. 475). The degree of care and caution required, depends upon the maturity and capacity of the individual, and all the surrounding circumstances (*Swift v. Staten I. T. Co.*, 123 N. Y. 645; 25 N. E. 378.

A mere error of judgment does not necessarily amount to carelessness (*McClain v. Brooklyn R. Co.*, 116 N. Y. 459; 22 N. E. 1062); but an instruction that mere error of judgment would not be negligence is erroneous, as not limiting it to the judgment of a man of ordinary and common prudence (*Hoyt v. N. Y. Lake Erie, etc. R. Co.*, 118 N. Y. 399; 23 N. E. 565). The general rule is illustrated in the following cases: *Powell v. N. Y. Central R. Co.*, 109 N. Y. 613; 15 N. E. 891 [crossing rapidly in snow storm]; *Daly v. Detroit etc. R. Co.*, 195 Mich. 193; 63 N. W. 73 [standing between tracks]; *Vertrees v. Newport News, etc. R. Co.*, 95 Ky. 314; 25 S. W. 1 [trespasser getting on moving engine]; *Blair v. Grand Rapids, etc. R. Co.*, 60 Mich. 124; 26 N. W. 855 [boarding moving train from good motives]; *Kelly v. Duluth, etc. R. Co.*, 92 Mich. 19; 52 N. W. 81 [engineer neglecting his own duty, when struck by train of another road]; *Culbertson v. Milwaukee, etc. R. Co.*, 88 Wisc. 567; 60 N. W. 998 [injured person had created the defect]; *Weller v. Chicago, etc. R. Co.*, 120 Mo. 635; 23 S. W. 1061; 25 Id. 532 [plaintiff driving fast].

³ See § 94, *ante*.

⁴ A person crossing the track at a regular crossing is not bound to ex-

fact of drunkenness on the part of one crossing or walking along a railroad track, raises a strong presumption of negligence;⁵ but it does not defeat a recovery if it did not proximately contribute to his injury; and the presumption may be rebutted by showing that he nevertheless was entirely careful of himself.⁶ A drunken person sometimes acts with great care; although the contrary is undoubtedly the general rule. The absence of a flagman at a crossing never gives a right to presume that it is safe to cross the track, if the traveler actually sees and knows, in time to avoid danger, that the road is not clear.⁷ Trainmen are not bound to watch cars, when in motion, so closely as to prevent children or others from climbing upon them,⁸ though it would be negligence knowingly to permit children to put themselves in such danger. Disregard of a

exercise extraordinary care for his own protection (see cases cited under §§ 85, 87, 90, *ante*). So held, in *Wilmington v. Chicago, etc. R. Co.*, 37 Iowa, 432; *Duffy v. Chicago, etc. R. Co.*, 32 Wisc. 269; *Gratoit v. Missouri Pac. R. Co.*, 116 Mo. 450; 21 S. W. 1094; *McNown v. Wabash R. Co.*, 55 Mo. App. 585; *Goodrich v. Burlington, etc. R. Co.*, Iowa, 66 N. W. 770; *Terre Haute, etc. R. Co. v. Voelker*, 129 Ill. 540; 22 N. E. 20; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496; 7 S. W. 857; *Kain v. N. Y. & New England R. Co.*, 50 Hun, 606; 3 N. Y. Supp. 311; see *Bennett v. N. Y. Central R. Co.*, 133 N. Y. 563; 30 N. E. 1149 [complicated case, held, one for jury]. But if plaintiff was a trespasser on the track, an instruction that, if the injury was caused by the negligence of defendant's servants, without any greater want of care on plaintiff's part than was reasonably to be expected from a person of ordinary care and prudence in his situation, plaintiff was entitled to recover, is erroneous (*Dahlstrom v. St. Louis, etc. R. Co.*, 96 Mo. 99; 8 S. W. 777).

⁵ See cases cited under § 110, *ante*; also *Brand v. Schenectady, etc. R.*

Co., 8 Barb. 368; *Parker v. Wilmington, etc. R. Co.*, 86 N. C. 221; *East Tennessee, etc. R. Co. v. Fain*, 12 Lea. 35; *McClelland v. Louisville, etc. R. Co.*, 94 Ind. 276; *Kean v. Baltimore, etc. R. Co.*, 61 Md. 154; *Wilds v. Brunswick, etc. R. Co.*, 82 Ga. 667; 9 S. E. 595; *Memphis, etc. R. Co., v. Womack*, 84 Ala. 149; 4 So. 618 [man killed while on track]; *Chattanooga, etc. R. Co. v. Clowdis*, 90 Ga. 258; 17 S. E. 88. It is error to exclude evidence that decedent was drunk at the time of the accident (*Illinois Central R. Co. v. Cragin*, 71 Ill. 177; *Chicago, etc. R. Co. v. Bell*, 70 Id. 102); or that plaintiff, in going upon the track when intoxicated, was guilty of but slight negligence (*Fulton, etc. R. Co. v. Butler*, 48 Ill. App. 301).

⁶ See cases cited under §§ 93, 94, *ante*.

⁷ *Pakalinsky v. N. Y. Central R. Co.*, 82 N. Y. 424; *Lake Shore, etc. R. Co. v. Sunderland*, 2 Bradwell, 307; *Guggenheim v. Lake Shore, etc. R. Co.*, 66 Mich. 150; 33 N. W. 161, and cases cited in note 8, § 466, *ante*.

⁸ *Woodbridge v. Delaware, etc. R. Co.*, 105 Pa. St. 460.

timely warning is evidence of negligence,⁹ provided it has such relation to the actual danger as to put the injured person on his guard;¹⁰ but it is not conclusive,¹¹ because many warnings are unfounded and even foolish. It must appear that the warning was heard, to make it competent evidence.¹²

§ 473. What is not contributory negligence.—Travelers have a right to expect that railroad trains will be managed in conformity to law, including statutes and ordinances, and they are generally not negligent in acting upon the assumption that speed will be limited¹ or signals given,² as required by law. But if they know that trains habitually violate the law in any respect, they cannot excuse their own want of care by claiming that they expected the law to be complied with.³ They have

⁹ *Pennsylvania R. Co. v. Henderson*, 43 Pa. St. 449; *Baltimore, etc. R. Co. v. Colvin*, 118 Pa. St. 230; 12 Atl. 337. See *Salmon v. N. Y. Central R. Co.*, 52 Hun, 612; 5 N. Y. Supp. 225. Such disregard, even when conscious, is not necessarily "*gross negligence*" (*Doble v. Boston, etc. R. Co.*, 145 Mass. 386; 14 N. E. 461). The negligence of a pedestrian who pays no attention to the warning given by the gates being down at a railroad crossing, but passes on the track, bars recovery for his injury by an approaching train, and it matters not that the gates were always down (*Sheehan v. Philadelphia, etc. R. Co.*, 166 Pa. St. 354; 31 Atl. 120.)

¹⁰ *Gray v. Scott*, 66 Pa. St. 345.

¹¹ *North Penn. R. Co. v. Robinson*, 44 Pa. St. 175.

¹² *Union R. Co. v. State*, 72 Md. 153; 19 Atl. 449; *Hackford v. N. Y. Central R. Co.*, 6 Lans. 381.

¹ A person walking on a railroad track located on a street has a right to assume, in the absence of any indication to the contrary, that the railroad company will obey an ordinance limiting the speed of trains in the city (*Cleveland, etc. R. Co. v.*

Harrington, 131 Ind. 426; 30 N. E. 37; *Lake Erie, etc. R. Co. v. Braf-ford*, 15 Ind. App. 665; 43 N. E. 882). So as to one driving across the track (*Schmidt v. Burlington, etc. R. Co.*, 75 Iowa, 606; 39 N. W. 916).

² A person attempting to cross a railroad track has a right to expect that the railroad will give the signals required by law (*Texas, etc. R. Co. v. Spradling*, 18 C. C. A. 496; 72 Fed. 152; *Cleveland, etc. R. Co. v. Harrington*, 131 Ind. 426; 30 N. E. 37 [trains from each direction]; *Atchison, etc. R. Co. v. Hague*, 54 Kans. 284; 38 Pac. 257).

³ Where plaintiff knew that the company habitually violated the ordinance as to the rate of speed, and that the train was moving at a rate of speed which was greater than allowed by ordinance, an instruction that plaintiff had a right to presume that defendant would not run its train at an unlawful rate of speed was erroneous. (*Payne v. Chicago, etc. R. Co.*, 129 Mo. 405; 31 S. W. 885.) But see *contra* *Dederichs v. Salt Lake City R. Co.*, 13 Utah. 34; 44 Pac. 649, where an electric car was running at the unusual rate

a right to rely upon representations made or invitations given by agents of a railroad company, having actual or ostensible authority, and the company cannot accuse them of negligence in so doing.⁴ But if a traveler did not in fact rely upon such acts, or if no person of common sense and prudence would have relied upon them, they are no excuse for his want of care.⁵ If any act is directed by an agent in charge at the particular spot, a traveler is justified in obeying such direction,⁶ unless it was unmistakably dangerous and rash,⁷ and the

of 20 miles an hour (much faster than was allowable by ordinance); no gong was sounded; and plaintiff, though he saw the car before he attempted to cross with his horse, considered that he had time to cross in front of the car. Held, question of contributory negligence was for the jury.

⁴ See fully, § 91, *ante*. So held, where the agent invited the plaintiff to cross at a dangerous place (*Warren v. Fitchburg R. Co.*, 8 Allen, 227; *Lunt v. Northwestern R. Co.*, L. R. 1 Q. B. 277); immediately behind a train (*Nicholson v. Lancashire, etc. R. Co.*, 3 Hurlst. & C. 534), or between its separated cars (*Cleveland, etc. R. Co. v. Keely*, 133 Ind. 600; 37 N. E. 406). Signals from a flagman amount to invitations (*Sweeny v. Old Colony, etc. R. Co.*, 10 Allen, 368; *Chicago, etc. R. Co. v. Clough*, 134 Ill. 586; 29 N. E. 184 [flagman gave wrong signal and changed too late]; *Buchanan v. Chicago, etc. R. Co.*, 75 Iowa, 393; 39 N. W. 663 [same]). See also *McGovern v. N. Y. Central R. Co.*, 67 N. Y. 417; *Wheelright v. Boston, etc. R. Co.*, 135 Mass. 225; *Peoples' Pass. R. Co. v. Green*, 56 Md. 84; *Lammert v. Chicago, etc. R. Co.* 9 Ill. App. 388; *Illinois, etc. R. Co. v. Shultz*, 64 Ill. 172. So also where gates are raised (*Bond v. N. Y. Central R. Co.*, 69 Hun, 476; 23 N. Y. Supp. 450; and see § 466, *ante*). See

Caswell v. Boston, etc. R. Co. (98 Mass. 194), where a lady was frightened by the conduct of railroad men, who apprehended danger. In attempting to cross a railroad track at a street crossing in front of an approaching train, a woman fell into a cattle-guard covered with snow so as to be concealed, and was run over. She would have crossed safely if she had not fallen into the cattle-guard. Held, that a nonsuit, on the ground of her contributory negligence in crossing in front of the train, was error. The question was one for the jury (*Hoffman v. N. Y. Central R. Co.*, 13 Hun, 589).

⁵ See § 91, *ante*.

⁶ So held, where a conductor ordered the plaintiff to step from one car to another while they were in motion (*McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; *affi'g* 43 Barb. 532), and where he ordered the plaintiff, who was a mere trespasser, to get off while the car was in motion (*Lovett v. Salem, etc. R. Co.*, 9 Allen 557).

⁷ Thus it is in vain to plead the advice of a brakeman or even a conductor to creep under a train (*Chicago, etc. R. Co. v. Sykes*, 1 Bradw. 520), or to climb over bumpers or otherwise rashly cross over a train (*Lake Shore, etc. R. Co. v. Pinchin*, 112 Ind. 592; 13 N. E. 677). It cannot be correctly charged as *matter of law* that one about to cross a

plaintiff in such case cannot be charged with contributory negligence, although the act should be one which, apart from this circumstance, would be deemed negligent. But mere *permission* to do a negligent act is no excuse.⁸ Knowledge of a defect in a highway crossing does not make it negligent, in every case, to use it. The question depends upon circumstances.⁹ An error of judgment under the pressure of a sudden emergency is not presumptively negligence. It is a question of fact for the jury.¹⁰ The fact that the injured person was in a place known to him to be dangerous, for reasons wholly unconnected with the railroad, is no evidence of such negligence on his part as would tend to excuse the railroad company.¹¹ The negligence of a company or a person in whose vehicle the plaintiff was riding is not imputed to him, in an action brought by him against a railroad company.¹²

railroad track was free from negligence because the flagman beckoned him on (Chicago, etc. R. Co. v. Spring, 13 Ill. App. 174).

⁸ Hickey v. Boston & Lowell R. Co., 14 Allen, 429. See Foss v. Chicago, etc. R. Co., 33 Minn. 392 [station agent told plaintiff to unload at a certain place on the platform, and his horse was killed while there, by an incoming train]; Pool v. Chicago, etc. R. Co., 53 Wisc. 657 [person in charge of hand car directed one to sit on behind and let his feet hang down]; Hartwig v. Chicago, etc. R. Co., 49 Wisc. 358 [plaintiff told to get on car at particular place]; Borst v. Lake Shore, etc. R. Co., 4 Hun, 346 [flagman beckoned to plaintiff to cross track] But query (?).

⁹ St. Louis, etc. R. Co. v. Box, 52 Ark. 368; 12 S. W. 757. Crossing on a public highway, where there are a number of side tracks, is not negligence *per se*, though by going a few blocks out of his way the traveler might have crossed the track at a safer place (Chicago, etc. R. Co. v. Clough, 134 Ill. 586; 25 N. E. 664; 29 Id. 184).

¹⁰ See § 89, *ante*. Wynn v. Central Park, etc. R. Co., 133 N. Y. 575; 30 N. E. 721; Fehnrich v. Mich. Central R. Co., 87 Mich. 606; 49 N. W. 890. Where one attempting to drive across a railroad crossing was struck by an engine, of the approach of which no warning was given, and which he could not see until he was on the track, the railroad company is not relieved from liability by the fact that, in trying to escape, he rashly jumped from the wagon, by remaining in which he would have escaped uninjured (International, etc. R. Co. v. Neff, 87 Tex. 303; 28 N. W. 283).

¹¹ Gray v. Scott, 66 Pa. St. 345. s. p., Bennett v. New Jersey R. Co., 36 N. J. Law, 225.

¹² See §§ 65 and 66, *ante*. In an action for injuries received by a street-car passenger in a collision with a railway train, negligence of the driver of the street car cannot be imputed to the passenger (Gulf, etc. R. Co. v. Pendry, 87 Tex. 553; 29 S. W. 1038). The negligence of a husband who is driving his wife over a railroad crossing, where she is injured, cannot be

§ 474. Fractious horse.—Whether the fractiousness of a horse, with which the plaintiff is attempting to cross a railroad, if it contributes to his injury, is to be imputed to him as negligence, may be an open question. It seems to have been sometimes held that it should be so imputed.¹ In other cases it has been considered that it should not be,² but in some cases, it appearing that the horse ran against the train in such a manner that the engineer could not avoid the accident, it was held that the railroad company was not liable, because neither party was responsible for the injury.³ If the fractiousness of the horse is occasioned by fault on the part of the railroad company, as, for example, by a defect in the track at a highway crossing,⁴ or the failure to give proper signals, leading the

imputed to the wife (*Lake Shore etc. R. Co. v. McIntosh*, 140 Ind. 261; 38 N. E. 476).

¹ *Illinois Central R. Co. v. Buckner*, 28 Ill. 299; *Rigler v. Charlotte, etc. R. Co.*, 94 N. C. 604. It is a question for the jury (*Loucks v. Chicago, etc. R. Co.*, 31 Minn. 526; 18 N. W. 651).

² *Bates v. N. Y. & New England R. Co.*, 60 Conn. 259; 22 Atl. 538 [horse becoming frightened rushed in front of train]; *McNeal v. Pittsburgh, etc. R. Co.*, 131 Pa. St. 184; 18 Atl. 1026 [young and excitable horse]; *Cleveland, etc. R. Co. v. Wynant*, 134 Ind. 681; 34 N. E. 569; *Leavitt v. Terre Haute, etc., R. Co.*, 5 Ind. App. 513; 31 N. E. 860; 32 Id. 866. The fact that the team driven by plaintiff had once before run away, and was easily frightened, did not constitute contributory negligence on plaintiff's part, in crossing a track on which an engine was standing, unless the disposition of the team was such that a person of ordinary prudence would not have attempted to drive it across the track at that time (*Kalbus v. Abbot*, 77 Wisc. 621; 46 N. W. 810). s. p., *Muncie St. Ry. Co. v. Maynard*, 5 Ind. App. 372; 32 N. E. 343 [engineer could have seen and

stopped in time but did not]; *Strauss v. Newburgh R. Co.*, 39 N. Y. Supp. 998 [very similar case]. Evidence that plaintiff, who was riding a mule, did not know that the mule was afraid of cars; but that the whistling of the locomotive frightened the animal so that it became unmanageable, and carried his rider upon the track, warranted a finding that plaintiff was free from negligence (*Prewitt v. Missouri, etc. R. Co.*, 134 Mo. 615; 36 S. W. 667).

³ *Richmond, etc. R. Co. v. Yeamans*, 90 Va. 752; 19 S. E. 787; *Coughtry v. Williamette St. R. Co.*, 21 Oreg. 245; 27 Pac. 1031. A verdict for plaintiff was set aside because the proximate cause of his injury was his inability to control his horse, and not the negligence of the company. It was held that the question of contributory negligence did not arise (*Cosgrove v. N. Y. Central R. Co.*, 13 Hun. 329; reaff'd, *Barringer v. N. Y. Central R. Co.*, 18 Id. 398; but reversed on appeal, on other grounds (87 N. Y. 89). s. p., *Campbell v. N. Y. Central R. Co.*, 51 Hun. 642; 4 N. Y. Supp. 265 [horse frightened by signal required by law].

⁴ *Milwaukee, etc. R. Co. v. Hunter*, 11 Wisc. 160; see *Southworth v. Old Colony, etc. R. Co.*, 105 Mass. 342.

driver to suppose that no train is coming, so that the horse is frightened by proximity to the train,⁵ it certainly is no defense. If it is caused by antecedent carelessness of the plaintiff, he is, of course, responsible for all its consequences.⁶ It is clearly negligent to drive an unbroken or vicious horse along a road running side by side with a railroad.⁷

§ 475. Crossing track in view of train.— It is generally contributory negligence to attempt to drive a team across the track of a steam railroad in full view of an approaching locomotive,¹ on account of the risk of becoming entangled in the

⁵ *Cosgrove v. N. Y. Central R. Co.*, 87 N. Y. 88. See more fully, § 426, *ante*.

⁶ The leaving of a span of horses unhitched in close proximity to a railroad, at the time when the train usually passes, is negligence; and if the owner afterwards, when the train arrives, and when the horses have moved to the track, attempts to rescue them and is injured, he is guilty of additional negligence, and cannot recover (*Deville v. So. Pacific R. Co.*, 50 Cal. 383). To same effect, *Hargis v. St. Louis, etc. R. Co.*, 75 Tex. 19; 12 S. W. 953; *Gulf, etc. R. Co. v. Box*, 81 Tex. 670; 17 S. W. 375. Deceased did not attempt to check his horses till coming into the right of way, when, they being frightened, he was unable to stop them. Held, that he was negligent, as he, when 400 feet distant, either could have seen the train, or thereafter drove at a reckless speed (*Pepper v. Southern Pac. R. Co.*, 105 Cal. 389; 38 Pac. 974).

⁷ *Philadelphia, etc. R. Co. v. Stinger*, 78 Pa. St. 219. Plaintiff having taken his horse, which was young, and unused to the place or cars, to the point in question, for the purpose of testing him, to see how he would act, was guilty of contributory negligence (*Cornell v. Detroit R. Co.*, 82 Mich. 495; 46 N. W. 791).

¹ *Wilds v. Hudson River R. Co.*, 29 N. Y. 315; 24 Id. 430; *Warner v. N. Y. Central R. Co.*, 44 Id. 465; *Mehegan v. N. Y. Central R. Co.*, 125 N. Y. 768; 26 N. E. 936; *State v. Maine Central R. Co.*, 76 Me. 357; *Moore v. Central R. Co.*, 24 N. J. L. 268; *Palys v. Erie R. Co.*, 30 N. J. Eq. 604; *Oberdorfer v. Phila. etc. R. Co.*, 149 Pa. St. 6; 27 Atl. 304; *Sigler v. Charlotte, etc. R. Co.*, 94 N. C. 604; *Zeigler v. Northeastern R. Co.* 5 S. C. 221; *Illinois Central R. Co. v. Buckner*, 28 Ill. 299; *Chicago, etc. R. Co. v. Jacobs*, 63 Id. 178; *Illinois Central R. Co. v. Goddard*, 72 Id. 567; *Chicago, etc. R. Co. v. Hatch*, 79 Id. 137; *Kelley v. Hannibal, etc. R. Co.*, 75 Mo. 188; *Powell v. Mo. Pacific R. Co.*, 76 Id. 80; *Indiana, etc. R. Co. v. Greene*, 106 Ind. 279; *Bellefontaine R. Co. v. Hunter*, 33 Id. 335; *Rhoades v. Chicago, etc. R. Co.*, 58 Mich. 263; *Hearne v. So. Pacific R. Co.*, 50 Cal. 482; *International, etc. R. Co. v. Kuehn*, 70 Tex. 582; 8 S. W. 484. One who undertakes to cross a railroad track in front of an approaching locomotive, where there is nothing to obstruct his view, is guilty of such contributory negligence as will prevent a recovery for his consequent injuries or death (*Delaware, etc. R. Co. v. Hefferan* [Ct. Errors], 57 N. J. Law, 149; 30

rails, or of the horses shying or balking, even where there is apparently time to cross. So it is, to attempt to cross when safety gates are down, as a warning that trains are close by;² So it is to drive a team toward a crossing at such reckless speed as to be unable to stop or turn on reaching the track;³ though it is otherwise if the team suddenly gets beyond the driver's control through the fault of the company.⁴ So it is negligent to walk or run across, in full view of a coming train,⁵

Atl. 578). To same effect, *Gangawer v. Philadelphia, etc. R. Co.*, 168 Pa. St. 265; 32 Atl. 21 [no signal]; *Tobias v. Michigan Cent. R. Co.*, 103 Mich. 330; 61 N. W. 514 [bad crossing immaterial]; *Brunette v. Chicago, etc. R. Co.*, 86 Wisc. 197; 56 N. W. 478; *Pepper v. Southern Pac. R. Co.*, 105 Cal. 389; 38 Pac. 974 [excessive speed immaterial]. One who rode in a vehicle at the invitation of the driver, and assumed the duties of a lookout as they attempted to cross a railroad track, and saw the headlight of an engine, but did not mention it to the driver, and neither asked the driver to stop nor to hurry forward, could not recover for injuries received at the crossing (*Smith v. Maine Cent. R. Co.*, 87 Me. 339; 32 Atl. 967).

²So held, as matter of law (*Cleary v. Philadelphia, etc. R. Co.*, 140 Pa. St. 19; 21 Atl. 242). *s. p.*, *Debbins v. Old Colony R. Co.*, 154 Mass. 402; 28 N. E. 274; *Marden v. Boston, etc. R. Co.*, 159 Mass. 393; 34 N. E. 404; [child familiar with crossing]; *Granger v. Boston, etc. R. Co.*, 146 Mass. 276; 15 N. E. 619.

³*Salter v. Utica, etc. R. Co.*, 75 N. Y. 273; *rev'g* 13 Hun, 187.

⁴*Cosgrove v. N. Y. Central R. Co.*, 87 N. Y. 88; *rev'g* 13 Hun, 329.

⁵So held, as matter of law, in the following cases: *Irey v. Pennsylvania R. Co.*, 132 Pa. St. 563; 19 Atl. 341; *Grows v. Maine Central R. Co.*, 67 Me. 100; *Young v. Old Colony R. Co.*, 156 Mass. 178; 30 N.

E. 560; *Donnelly v. Brooklyn R. Co.*, 109 N. Y. 16; 15 N. E. 733; *Schwier v. N. Y. Central R. Co.*, 15 Hun, 572; [boy of four years]; *State v. Baltimore, etc. R. Co.*, 73 Md. 374; 21 Atl. 62 [six feet distant]; *Marks v. Petersburg R. Co.*, 88 Va. 1; 13 S. E. 299 [train seven feet distant]; *Campbell v. Richmond, etc. R. Co. [Va.]*, 21 S. E. 480; *Norwood v. Raleigh, etc. R. Co.*, 111 N. C. 236; 16 S. E. 4; *Craddock v. Louisville, etc. R. Co. [Ky.]*, 16 S. W. 125 [unreasonable speed]; *Johnson v. Louisville, etc. R. Co.*, 91 Ky. 651; 25 S. W. 754 [no signal]; *Ohio, etc. R. Co. v. Hill*, 117 Ind. 56; 18 N. E. 461; *Korraday v. Lake Shore, etc. R. Co.*, 131 Ind. 261; 29 N. E. 1069; *Pittsburgh, etc. R. Co. v. Bennett*, 9 Ind. App. 92; 35 N. E. 1033 [train 900 feet distant]; *Schlingen v. Chicago, etc. R. Co.*, 90 Wisc. 186; 62 N. W. 1045. For one to go on a railroad track immediately in front of an approaching train is negligence, no matter what he may say about having stopped, looked, and listened (*Sheehan v. Philadelphia, etc. R. Co.*, 166 Pa. St. 354; 31 Atl. 120; *Myers v. Balto. etc. R. Co.*, 150 Pa. St. 386; 24 Atl. 747). It is not, however, necessarily gross negligence, as a matter of law, to attempt to drive over crossing in front of a train which he sees approaching (*Manley v. Boston, etc. R. Co.* 159 Mass. 493; 34 N. E. 951); there may be palliating circumstances (*Id.*).

unless it is very clear that there is ample time to cross, after allowing for the possibility of a misstep. Standing unnecessarily upon the track in front of a train liable to move at any moment,⁶ or even outside the track, within two or three feet of a rapid train, is also negligence.⁷ It is not enough that the chances are equally balanced; nice calculations are not allowed. The decided weight of probability should be against the chance of a collision.⁸ But if one, without negligence, has driven so close to the track that he cannot well stop, it is not necessarily negligence on his part to drive on, even in view of a train.⁹ It is otherwise, however, where the traveler's danger is the direct result of his own previous negligence.¹⁰ When a train is running within city limits and is restricted by ordinance to slow speed, a traveler is justified in crossing in view of the train, if it would be entirely safe to do so, were the lawful speed not exceeded.¹¹ These stringent rules have no application to railroads operated along and not merely across a public highway, whether by horses, cables or electric power, and which are not required to purchase or condemn the land.¹² The rule in such cases will be stated elsewhere.¹³ And no presumption of negligence arises from an attempt to cross in front of a stationary train or engine.¹⁴

⁶ East Tennessee, etc. R. Co. v. Chicago, etc. R. Co., 81 Wisc. 41; 50 N. W. 412.

⁷ Esrey v. Southern Pac. R. Co., 88 Cal. 399; 26 Pac. 211.

⁸ The rule laid down in Belton v. Baxter (54 N. Y. 245), that it "is negligence *per se* for a foot traveler to attempt to cross a public thoroughfare ahead of vehicles of any kind upon nice calculations of the chances of injury," has been applied to railroad trains (Wendell v. N. Y. Central R. Co., 91 N. Y. 420). See also Connelly v. N. Y. Central R. Co., 88 N. Y. 346; Texas, etc. R. Co. v. Cody, 67 Fed. 71; 14 C. C. A. 310.

⁹ Robbins v. Fitchburg R. Co., 161 Mass. 145; 36 N. E. 752; Grand Rapids, etc. R. Co. v. Cox, 8 Ind. App. 29; 35 N. E. 183.

¹⁰ Potter v. Flint, etc. R. Co., 62 Mich. 22; 28 N. W. 714; Olson v.

¹¹ Schmidt v. Burlington, etc. R. Co., 75 Iowa, 606; 39 N. W. 916.

¹² Newark R. Co. v. Block [Ct. Errors], 55 N. J. Law, 605; 27 Atl. 1067; Connolly v. Trenton R. Co. [Ct. Errors], 56 N. J. Law, 600; 29 Atl. 438; Omslaer v. Traction Co., 168 Pa. St. 519; 32 Atl. 50; and § 485c, *post*.

¹³ See § 485c, *post*.

¹⁴ Plaintiff's intestate, seeing a switch engine without a light, standing where he had observed it nearly an hour before, stepped upon the track, and, his attention being directed towards a passenger train, was run over by the switch engine, which suddenly started without any signal. Held, that a verdict for plaintiff should not be disturbed (Ohio, etc. R. Co. v. Hill, 7 Ind. App.

§ 476. **Duty to look and listen.**—It is a rule of almost invariable application that a traveler who knows or is bound to know that he is about to cross the track of a railroad,¹ upon which trains may lawfully run at greater speed than ordinary vehicles upon highways,² must both look³ and listen⁴ for

255; 34 N. E. 646). So, also, where a train has no engine and does not seem to be moving, although it is (Chicago, etc. R. Co. v. Gomes, 46 Ill. App. 255). Compare, however, *Barkley v. Missouri Pac. R. Co.*, 96 Mo. 367; 9 S. W. 793.

¹ This is an essential condition (*Winchell v. Abbot*, 77 Wisc. 371; 46 N. W. 665 [plaintiff not aware of railroad, being unfamiliar with the place]; *Elkins v. Boston, etc. R. Co.*, 115 Mass. 190; *Wilson v. N. Y., New Haven, etc. R. Co.*, 18 R. I., 598; 29 Atl. 300.)

² This is an essential condition of the strict rules here laid down (see § 485*c*, *post*; and § 475, note 8). The extent to which these rules apply, where street railroads or slow motors are concerned, will be stated hereafter (§ 485*c*, *post*).

³ The neglect to look out for trains on approaching a crossing is *prima facie*, negligence, and "this presumption of negligence can only be rebutted by facts or circumstances which show that it was not reasonably practicable to make or keep such lookout, or which would ordinarily induce persons of common prudence to omit that precaution" (*Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670). Without proper explanation and excuse, such neglect is not merely evidence of negligence, but negligence *per se* (*Schofield v. Chicago, etc. R. Co.*, 114 U. S. 615; *Chicago, etc. R. Co. v. Houston*, 95 Id. 697; *Tolman v. Syracuse, etc. R. Co.*, 98 N. Y. 198; *Steves v. Oswego, etc. R. Co.*, 18 Id. 422; *Rodrian v. N. Y., New Haven, etc. R. Co.*, 125 N. Y. 526; 26 N. E. 741 [ears muffled: did

not look either way]; *State v. Maine Central, R. Co.*, 77 Me. 673; *Sprow v. Boston, etc. R. Co.*, 163 Mass. 330; 39 N. E. 1024; *Allyn v. Boston, etc. R. Co.*, 105 Mass. 77; *Butterfield v. Western R. Co.*, 10 Allen, 532; *North Penn. R. Co. v. Heileman*, 49 Pa. St. 60; *Chicago, etc. R. Co. v. Gretzner*, 46 Ill. 75; *Toledo, etc. R. Co. v. Goddard*, 25 Ind. 185; *Matta v. Chicago, etc. R. Co.*, 69 Mich. 109; 37 N. W. 54 [deceased seated backwards in wagon]; *Dawe v. Flint, etc. R. Co.*, 102 Mich. 307; 60 N. W. 838 [foot-passenger]; *Buelow v. Chicago, etc. R. Co.*, 92 Iowa 240; 60 N. W. 617 [railroad yard]; *Pannell v. Nashville, etc. R. Co.*, 97 Ala. 298; 12 So. 236 [crossing between freight cars, during coupling, without looking]; *Magner v. Truesdale*, 53 Minn. 436; 55 N. W. 607; *Galveston, etc. R. Co. v. Kutac*, 72 Tex. 643; 11 S. W. 127). To the same effect, see many cases cited under § 90, *ante*; also *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Maher v. Atlantic, etc. R. Co.*, 64 Mo. 267; *Chicago, etc. R. Co. v. Bell*, 70 Ill. 102; *Rockford, etc. R. Co. v. Byam*, 80 Id. 528; *Benton v. Central R. Co.*, 42 Iowa, 192; *Schaefer v. Chicago, etc. R. Co.*, 62 Id. 624; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66; *Blaker v. N. J. Midland R. Co.*, 30 N. J. Eq. 240; *Pennsylvania R. Co. v. Righter*, 42 N. J. Law, 180 Haas v. Chicago, etc. R. Co., 41 Wisc. 44; *Harris v. Minneapolis, etc. R. Co.*, 37 Minn. 47; 33 N. W. 12; *Brown v. Milwaukee, etc. R. Co.*, 22 Minn. 165; *Stubley v. Northwestern R. Co.*, L. R., 1 Exch. 13, 19; 4 Hurlst. & R. 83.

⁴ Travelers must look *and* listen (*Salter v. Utica, etc. R. Co.*, 75 N.

approaching trains before even attempting to cross the track. He must do this every time that he crosses the track, even if he goes to and fro.⁵ He should in this manner make sure that the crossing is clear and safe before using it. He ought not to take any chances.⁶ A traveler must look in every direction from which engines could possibly come;⁷ as a

Y. 273; Thompson v. Buffalo, etc. R. Co., 145 Id. 196; 39 N. E. 709; [street railroad]; Merkle v. N. Y., Lake Erie, etc. R. Co. [Ct. Errors], 49 N. J. Law, 473; 9 Atl. 680; Berry v. Pennsylvania R. Co., 48 N. J. Law, 141; 4 Atl. 303; Union R. Co. v. State, 72 Md. 153; 19 Atl. 449; North Penn. R. Co. v. Heileman, 49 Pa. St. 60; Mynning v. Detroit, etc. R. Co., 64 Mich. 93; 31 N. W. 147; Denver, etc., R. Co. v. Ryan, 17 Colo. 98; 26 Pac. 79; Wichita, etc. R. Co. v. Davis, 37 Kans. 743; 16 Pac. 78; Herlisch v. Louisville, etc. R. Co., 44 La. Ann. 280; 10 So. 628; Glascock v. Central Pac. R. Co., 73 Cal. 137; 14 Pac. 518). An instruction to the jury that it was the duty of plaintiff to exercise care in crossing the track, *either* in looking in both directions, *or* to listen, etc., was held to be erroneous, because in the alternative (Chicago, etc. R. Co. v. Gertsen, 15 Ill. App. 614). In the following cases, the plaintiff neither looked nor listened. Held, negligence as matter of law: Nash v. N. Y. Central R. Co., 125 N. Y. 715; 26 N. E. 266; Philadelphia, etc. R. Co. v. Peebles, 67 Fed. 591; 14 C. C. A. 555; Louisville, etc. R. Co. v. Stommel, 126 Ind. 35; 25 N. E. 863; Schilling v. Chicago, etc. R. Co., 71 Wisc. 255; 37 N. W. 414; Johnson v. Chicago, etc. R. Co., 91 Iowa, 248; 59 N. W. 66; Carney v. Chicago, etc. R. Co., 46 Minn. 220; 48 N. W. 912; Yancey v. Wabash, etc. R. Co., 93 Mo. 433; 6 S. W. 272; Union Pac. R. Co. v. Adams, 33 Kans. 427; 6 Pac. 529; Clark v. Mis-

souri Pac. R. Co., 35 Kans. 350; 11 Pac. 134; Durbin v. Oregon, etc. R. Co., 17 Ore. 5; 17 Pac. 5.

⁵ Scott v. Pennsylvania R. Co., 130 N. Y. 679; 29 N. E. 289; Nolan v. Milwaukee, etc. R. Co., 91 Wisc. 16; 64 N. W. 319.

⁶ See Wendell v. N. Y. Central R. Co., 91 N. Y. 420.

⁷ Weber v. N. Y. Central R. Co., 58 N. Y. 451; Allerton v. Boston & M. R. Co., 146 Mass. 241; 15 N. E. 621; Ormsbee v. Boston & P. R. Co., 14 R. I. 102; Pennsylvania R. Co. v. Leary, 56 N. J. Law, 705; 29 Atl. 678; Pennsylvania Co. v. Meyers, 136 Ind. 242; 36 N. E. 32; Thornton v. Cleveland, etc. R. Co., 131 Ind. 492; 31 N. E. 185; Grostick v. Detroit, etc. R. Co., 90 Mich. 594; 51 N. W. 667; Guta v. Lake Shore, etc. R. Co., 81 Mich. 291; 45 N. W. 821; Duvall v. Mich. Central R. Co., 105 Mich. 386; 63 N. W. 437 [standing on one of a dozen tracks]; Nelson v. Duluth, etc. R. Co. 88 Wisc. 392; 60 N. W. 703; Yeager v. Atchison, etc. R. Co., 94 Iowa, 46; 62 N. W. 672; Vogg v. Missouri Pac. R. Co., Mo. ; 36 S. W. 646 [track crossing sidewalk: plaintiff sauntering and not looking]; Clark v. Mo. Pacific R. Co., 35 Kans. 350; 11 Pac. 134; Martin v. Little Rock, etc. R. Co., 62 Ark. 156; 34 S. W. 545; Jobe v. Memphis, etc. R. Co., 71 Miss. 734; 15 So. 129; Denver, etc., R. Co. v. Ryan, 17 Colo. 98; 28 Pac. 79; Holmes v. South Pac. Coast R. Co., 97 Cal. 161; 31 Pac. 834 [failure to look in the right direction]. It is contributory negligence *per se*

general but not invariable rule, if he is riding or driving, he must begin to look and listen at such distance from the track as will enable him to control his team, if he has one; he must so moderate its speed as to keep it under control,⁸ and must continue to look and listen until he has crossed the track.⁹ But circumstances may excuse him from looking more than once;¹⁰ and there is no arbitrary rule requiring him to look "constantly."¹¹ A foot passenger must not content himself with looking, while at some distance from the track. He must look again when close to the track.¹² If, without any

for a stranger who is in the switching yard of a railroad, where cars and engines are constantly passing in both directions, to walk along a track without looking behind him for cars approaching from his rear (*Kansas City, etc. R. Co. v. Cook*, 66 Fed. 115; 13 C. C. A. 364).

⁸ *Western Maryland R. Co. v. Kehoe*, 83 Md. 434; 35 Atl. 90 [violent driving down hill]; *Martin v. N. Y. Central R. Co.*, 66 Hun, 636; 21 N. Y. Supp. 919 [6 or 8 miles an hour; saw train too late]; *Mulligan v. N. Y. Central R. Co.*, 58 Hun, 602; 11 N. Y. Supp. 452 [train in sight; drove at trot; disregarded warning]; *Crandall v. Lehigh Val. R. Co.*, 72 Hun, 431; 25 N. Y. Supp. 151 [driving fast]; *Powell v. N. Y. Central R. Co.*, 109 N. Y. 613; 15 N. E. 891 [driving 10 miles an hour, in a snow storm]; *Reeves v. Dubuque, etc. R. Co.*, 92 Iowa, 32; 60 N.W. 243 [plaintiff drove with increasing speed down an incline to the tracks].

⁹ Plaintiff, a motorman on an electric railway, stopped his car about 40 feet from the crossing of defendant's railroad, and looked in both directions, but saw no train. At this point, and up to within 10 feet of the track, a train could have been seen 570 feet distant. Plaintiff started his car, but did not look again until about 5 feet from the track, when he saw a train about 200 feet from him, and his car was

struck before it got across the track. Held, contributory negligence precluding a recovery (*Vreeland v. Cincinnati, etc. R. Co.*, Mich. ; 67 N.W. 905). The track was visible for several hundred feet at a point on the road 55 feet from the crossing, and the only place plaintiff stopped to look was 293 feet from the crossing, where he could not see an approaching hand car. Held, the company was not liable (*Plummer v. N. Y. Central R. Co.*, 168 Pa. St. 62; 31 Atl. 887).

¹⁰ *Jennings v. St. Louis, etc. R. Co.*, 112 Mo. 268; 20 S. W. 490 [once enough, under the circumstances]; *Thompson v. N. Y. Central R. Co.*, 110 N. Y. 636; 17 N. E. 690 [twice enough].

¹¹ *Kenney v. Hannibal, etc. R. Co.*, 105 Mo. 270; 15 S. W. 983; 16 Id. 837. It is error to charge that it was plaintiff's duty, when approaching the crossing, to look and listen "at all points" in his passage (*Winey v. Chicago, etc. R. Co.*, 92 Iowa, 622; 61 N. W. 218).

¹² *Tucker v. N. Y. Central R. Co.*, 124 N. Y. 308; 26 N. E. 916; *Fowler v. N. Y. Central R. Co.*, 74 Hun, 141; 26 N. Y. Supp. 218 [must keep on looking]; *Moore v. N. Y. Central R. Co.*, 62 Hun, 621; 17 N. Y. Supp. 205 [did not look after starting to cross]; *Hinkle v. Richmond, etc. R. Co.*, 109 N. C. 472; 13 S. E. 884 [looking once, at a distance].

act or defect of his own, the traveler's view is entirely obstructed in one direction, it is sufficient for him to look in the other.¹³ But if his view is obstructed in any degree or from any cause¹⁴ (even by the fault of the railroad company¹⁵), he must look again, after passing the obstruction, and if he cannot see, he must listen, with increased vigilance.¹⁶ So also, if for any reason he cannot hear distinctly, he must use all the more vigilance in looking.¹⁷ One who stands or lingers on the track, or walks along it, must continuously look and listen.¹⁸ If the unexplained evidence shows that the injured person could certainly have seen the train in ample time to avoid it, if he had looked, it is to be conclusively presumed that he did not look or did not heed; and he is to be held negligent as matter of law;¹⁹ but if there is any reasonable doubt upon this point, it

¹³ *Cleveland, etc. R. Co. v. Crawford*, 24 Ohio St. 631; *McGuire v. Hudson River R. Co.*, 2 Daly, 76.

¹⁴ *Young v. N. Y. Lake Erie, etc. R. Co.*, 107 N. Y. 500; 14 N. E. 434; *Kelsay v. Missouri Pac. R. Co.*, 129 Mo. 362; 30 S. W. 339; *Jensen v. Michigan Cent. R. Co.*, 102 Mich. 176; 60 N. W. 57.

¹⁵ *Daniels v. Staten Is. R. Co.*, 125 N. Y. 407; 26 N. E. 466 [view obstructed by trains]; *Butts v. St. Louis, etc. R. Co.*, 98 Mo. 272; 11 S. W. 754 [same]; *Donnelly v. Boston, etc. R. Co.*, 151 Mass. 210; 24 N. E. 38 [same]; *Marty v. Chicago, etc. R. Co.*, 38 Minn. 108; 35 N. W. 670; *Hinken v. Iowa Cent. R. Co.* [Iowa] 66 N. W. 882 [obstructions caused by company].

¹⁶ The railroad track is a warning of danger; and persons about to cross it are bound to make use of the sense of *hearing*, as well as *sight*; and if either cannot be rendered available, the obligation to use the other is the stronger. Omission to do so is of itself negligence (*Mynning v. Detroit, etc. R. Co.*, 59 Mich. 257; 26 N. W. 514; *Thomas v. Chicago, etc. R. Co.*, 86 Mich. 496; 49 N. W. 547).

¹⁷ *Steves v. Oswego, etc. R. Co.*, 18 N. Y. 422 [ears muffled]. So held as to deaf persons (*Heaney v. Long Island R. Co.*, 112 N. Y. 122; 19 N. E. 422; *Phillips v. Detroit, etc. R. Co.*, Mich. ; 69 N. W. 496).

¹⁸ *Norfolk, etc. R. Co. v. Wilson*, 90 Va. 263; 18 S. E. 35; *Southeast, etc. R. Co. v. Stotlar*, 43 Ill. App. 94; *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434; 15 S. W. 665 [walking along track].

¹⁹ *Schofield v. Chicago, etc. R. Co.*, 114 U. S. 615; *Lesan v. Maine Central R. Co.*, 77 Me. 85; *Wilcox v. Rome, etc. R. Co.*, 39 N. Y. 358; *Mitchell v. N. Y. Central R. Co.*, 64 N. Y. 655; *Freeman v. Duluth, S. S. etc. R. Co.*, 74 Mich. 86; 41 N. W. 872; *Indiana, etc. R. Co. v. Hammock*, 113 Ind. 1; 14 N. E. 737; *Haetsch v. Chicago, etc. R. Co.*, 87 Wisc. 304; 58 N. W. 393; *Weyl v. Chicago, etc. R. Co.*, 40 Minn. 350; 42 N. W. 24. No matter what the plaintiff may testify as to his care, yet if he was struck by an approaching train which was plainly visible from the point occupied by him when it became his duty to stop, look and listen, he will be conclusively presumed to have disre-

is a question of fact.²⁰ It is no excuse for failure to look and listen, that the traveler did not think, just then, about the railroad or its dangers,²¹ or that his attention was diverted by some trivial matter,²² or that he believed that all trains stopped short of the crossing,²³ or that no regular train was due,²⁴ or that a train had recently (but not immediately) passed,²⁵ or that the usual or statutory signals of approaching trains were

garded the rule and to have gone negligently into danger (*Myers v. Baltimore, etc. R. Co.*, 150 Pa. St. 386; 24 Atl. 747; cited and followed, *Kelsay v. Missouri Pac. R. Co.*, 129 Mo., 362; 30 S. W. 339). s. p., *Miller v. Truesdale*, 56 Minn. 274; 57 N. W. 661; *Artz v. Chicago, etc. R. Co.*, 34 Iowa, 153; *Kwiatkowski v. Chicago, etc. R. Co.*, 70 Mich. 549; 38 N. W. 463).

²⁰ *Craig v. N. Y., New Haven, etc. R. Co.*, 118 Mass. 481. See also *Hackford v. N. Y. Central R. Co.*, 53 N. Y. 654; *Haycroft v. Lake Shore, etc. R. Co.*, 64 Id. 636; *Groner v. Delaware, etc. Canal Co.*, 153 Pa. St. 390; 26 Atl. 7; *Arnold v. Phila. etc. R. Co.*, 161 Pa. St. 1; 28 Atl. 941 [conflicting evidence]. It does not always follow from the fact that many other people saw a train or heard signals, that an injured person either did so or was in fault for not doing so. So held, in cases of persons killed at a crossing (*Greany v. Long Island R. Co.*, 101 N. Y. 419; 5 N. E. 425; *Sherry v. N. Y. Central R. Co.*, 104 N. Y. 652; 10 N. E. 128). So, also, where a civil engineer was able to see trains from a certain point, it did not follow that every traveler could (*Massoth v. Delaware, etc. Canal Co.*, 64 N. Y. 524).

²¹ *Clark v. Mo. Pac. R. Co.*, 35 Kans. 350; 11 Pac. 184. Plaintiff, engaged in taking freight across a railroad track, was so absorbed in his work that he omitted to notice a train backing down. Held, as mat-

ter of law, that he could not recover (*Carroll v. Minn. Valley R. Co.*, 13 Minn. 30; and see *Rothe v. Milwaukee, etc. R. Co.*, 21 Wisc. 256; s. p., *Baltimore, etc. R. Co. v. Whitacre*, 35 Ohio St. 627; *Boggs v. Great Western R. Co.*, 23 Upper Canada [C. P.], 573).

²² A person about to cross a railway track is not excused from looking for approaching cars upon the track he is about to cross by the fact that he was watching a train passing on another track, which diverted his attention, although it constituted neither an obstruction nor a danger to his further passage (*Woodard v. N. Y., Lake Erie, etc. R. Co.*, 106 N. Y., 369; 13 N. E. 424). s. p., *Chewning v. Ensley R. Co.*, 100 Ala. 493; 14 So. 204; *Gardner v. Detroit, etc. R. Co.*, 97 Mich. 240; 56 N. W. 603 [attention diverted by switch engine].

²³ *Smith v. Wabash R. Co.*, 141 Ind. 92; 40 N. E. 270).

²⁴ *Vincent v. Morgan's, R. Co.*, 48 La. Ann. 933; 20 So. 207. It is no excuse for failure to look and listen that the train was not a regular train (*Judson v. Great Northern R. Co.*, 63 Minn. 248; 65 N. W. 447).

²⁵ Failure to look and listen is not excused by the fact that a train had recently passed in the same direction where plaintiff had time, after the passing of such train, to cross the track twice and was injured while attempting to cross for the third time (*Smith v. Wabash R. Co.*, 141 Ind. 92; 40 N. E. 270).

not given.²⁶ Other excuses, such as open gates, invitations to cross and the like, are reserved for consideration in the next section. If the traveler both looks and listens, no more can be expected of him,²⁷ and he is not bound to inquire at what time trains are due at the crossing.²⁸ Except in Pennsylvania, there is no invariable rule requiring a person crossing to *stop*, as well as to look and listen;²⁹ but, in general, it is for the jury to

²⁶ *Dublin, etc. R. Co. v. Slattery*, L. R. 3 App. Cas. 1166; *Kellogg v. N. Y. Central R. Co.*, 79 N. Y. 72; *Cullen v. Delaware, etc. Canal Co.*, 113 Id. 667; 21 N. E. 716; *Rodrian v. N. Y., New Haven, etc. R. Co.*, 125 N. Y. 526; 26 N. E. 741; *Ormsbee v. Boston & P. R. Co.*, 14 R. I. 102; *Maryland Central R. Co. v. Neubeur*, 62 Md. 391; *Western M. R. Co. v. Kehoe*, 83 Md. 434; 35 Atl. 90; *Johnson v. Chesapeake, etc. R. Co.*, 91 Va. 171; 21 S. E. 238; *Louisville, etc. R. Co. v. Richards*, 100 Ala. 365; 13 So. 944; *Leak v. Georgia Pac. R. Co.*, 90 Ala. 161; 8 So. 245; *Williams v. Chicago, etc. R. Co.*, 64 Wisc. 1; 24 N. W. 422; *Baltimore, etc. R. Co. v. Depew*, 40 Ohio St. 121; *Nixon v. Chicago, etc. R. Co.*, 84 Iowa, 331; 51 N. W. 157; *International, etc. R. Co. v. Graves*, 59 Tex. 330; *Houston, etc. R. Co. v. Richards*, 59 Id. 373 [engine carried no headlight].

²⁷ *Kennayde v. Pacific R. Co.*, 45 Mo. 255; *Tabor v. Missouri, etc. R. Co.*, 46 Id. 353; see *Richardson v. N. Y. Central R. Co.*, 45 N. Y. 846. As to what evidence will suffice to establish the use of these precautions in favor of a deceased person, see § 481*a*, *post*; *Davis v. N. Y. Central R. Co.*, 47 N. Y. 409; *Nehrbas v. Central Pacific R. Co.*, 62 Cal. 320. Plaintiff, when about to cross a railroad track, looked up and down the track, and saw that it was clear, and then started, and had proceeded only a few steps when a switch engine came around the curve at high

speed without signals, and struck him. Held, no negligence could be attributed to him (*Chicago, etc. R. Co. v. Ryan*, 70 Ill. 211).

²⁸ *South, etc. Ala. R. Co. v. Thompson*, 62 Ala. 494.

²⁹ In Pennsylvania, it is an inflexible rule that the driver of a team should *stop*, as well as look and listen, before crossing the track, and that failure is negligence *per se* (*Pennsylvania R. Co. v. Beale*, 73 Pa. St., 504; *Ellis v. Lake Shore, etc. R. Co.*, 138 Id. 506; 21 Atl. 140). But this rule does not exist in any other state. It is almost always a question for the jury (*Weber v. N. Y. Central R. Co.*, 58 N. Y. 451; *Kellogg v. N. Y. Central R. Co.*, 79 Id. 72; *Hixson v. St. Louis, etc. R. Co.*, 80 Mo. 335; *Duffy v. Chicago, etc. R. Co.*, 32 Wisc. 269; *Bunting v. Central Pacific R. Co.*, 14 Nev. 351; *Leavenworth, etc. R. Co. v. Rice*, 10 Kans. 426; *Spencer v. Illinois Central R. Co.*, 29 Iowa, 55; *Houston, etc. R. Co. v. Wilson*, 60 Tex. 142; *Alexander v. Richmond, etc. R. Co.*, 112 N. C. 720; 16 S. E. 896; *Cincinnati, etc. R. Co. v. Wright*, Ky. ; 34 S. W. 526; *Beanstrom v. Northern Pac. R. Co.*, 46 Minn. 193; 48 N. W. 778; *Ladouceur v. Northern Pac. R. Co.*, 6 Wash. St. 280; 33 Pac. 556, 1080). So held, also, in the Federal courts (*Continental Imp. Co. v. Stead*, 95 U. S. 161). It is unquestionably not the law of New York (*Neudœrffer v. Brooklyn R. Co.*, 9 N. Y. App. Div. 66; citing

say upon all the facts, whether the plaintiff ought to have stopped.³⁰ In very peculiar cases, a failure to stop may be deemed negligence, as matter of law, and justify a nonsuit.³¹ A traveler, driving in a covered carriage, is not thereby excused from looking and listening for trains.³² On the contrary, he is rather bound to the use of greater vigilance, because of the obstructions with which he has surrounded himself.³³ If he cannot see and hear distinctly, it may be his

Davis v. N. Y. Central R. Co., 47 N. Y. 400). But in Pennsylvania, the rule is adhered to, and applied to foot-passengers also (Pennsylvania R. Co. v. Aiken [Pa.], 18 Atl. 619; Omslaer v. Pittsburgh Traction Co., 168 Pa. St. 519; 32 Atl. 50); but not to street railroads (Id.). If a traveler cannot see the track by looking out from his carriage, because of natural obstructions, he should get out and lead his horse (Pennsylvania R. Co. v. Beale, 73 Pa. St. 504; followed in Reading, etc. R. Co. v. Ritchie, 102 Id. 425.) But see Pennsylvania R. Co. v. Ackerman, 74 Id. 265.

³⁰ Dolan v. Delaware, etc. Canal Co., 71 N. Y. 285; Stackus v. N. Y. Central R. Co., 79 Id. 464; Chicago, etc. R. Co. v. Lane, 130 Ill. 116; 22 N. E. 513 [did not stop].

³¹ Plaintiff was driving a four-horse team along a road parallel to the railroad, and was approaching a crossing with which he was familiar; the air was so filled with dust that he could not see the railroad, and his wagon was noisy. Held, that he was guilty of negligence in not *stopping* to listen before crossing (Flemming v. Western Pac. R. Co., 49 Cal. 253). s. p., Pence v. Chicago, etc. R. Co., 63 Iowa, 746; 19 N. W. 785. Plaintiff drove a wagon loaded with boxes of empty bottles across a railroad track at a point where it was impossible to perceive an approaching train till

within six or eight feet of the track. Held, that as the rattling of the bottles prevented his hearing the noise of the trains, it was contributory negligence not to stop and listen before crossing the track (Merkle v. N. Y. Lake Erie, etc. R. Co. [Ct. Errors], 49 N. J. Law, 473; 9 Atl. 680). s. p., Brady v. Toledo, etc. R. Co., 81 Mich. 616; 45 N. W. 1110 [noisy mill near by]; Shufelt v. Flint, etc. R. Co., 96 Mich. 327; 55 N. W. 1013 [obstructed view]; Littaur v. Naragansett Pier R. Co., 61 Fed. 591 [same]. See also, Morris, etc. R. Co. v. Haslan (33 N. J. Law, 147), where one drove a heavy team across in a foggy morning without waiting.

³² It is negligence to approach a crossing without thinking of it, driving fast, with the carriage-top up (McCall v. N. Y. Central R. Co., 54 N. Y. 642; Glendening v. Sharp, 22 Hun, 78; Terre Haute, etc. R. Co. v. Clark, 73 Ind. 168); though it is not negligence *per se* for the traveler not to lower the top of his carriage to enable him the better to see (Stackus v. N. Y. Central R. Co., 79 N. Y. 464). To same effect, Gillespie v. Newburgh, 54 Id. 468; compare Sheffield v. Rochester, etc. R. Co., 21 Barb. 339.

³³ Brickell v. N. Y. Central R. Co., 120 N. Y. 290; 24 N. E. 449 [top-buggy: snow storm: did not look]; Allen v. Maine Central R. Co., 82 Me. 111; 19 Atl. 105 [plaintiff looked twice: yet nonsuited]. Where the

duty to stop, so as to look free from the cover of his carriage; and in some cases, it may be his duty to get out of the carriage, so as to have a clear view. But this is for the jury to decide.³⁴ The question whether the traveler chose the best place to look from is for the jury.³⁵

§ 477. When failure to look and listen excused. — Except in Pennsylvania, the obligation to look and listen, before crossing a railroad on a level, is not absolute and unbending.¹ It is

deceased, in approaching a railroad, neglected to look out from his covered carriage until the horse was on the track, an instruction that no failure on the part of the railroad company to do its duty could excuse the failure of deceased to use his sense of sight and hearing was proper (N. Y., Phila. etc. R. Co. v. Kellam, 83 Va. 851; 3 S. E. 703).

³⁴ Failure to get out of wagon and look not, in law, contributory negligence, but a question for the jury (Georgia Pac. R. Co. v. Lee, 92 Ala. 262; 9 So. 230; Hinkle v. Richmond, etc. R. Co., 109 N. C. 472; 13 S. E. 884).

³⁵ Where a traveler stopped, looked, and listened before attempting to cross a track, the question whether he did so at the best place is one of fact for the jury (Ellis v. Lake Shore, etc. R. Co., 138 Pa. St. 506; 21 Atl. 140; Link v. Philadelphia, etc. R. Co., 165 Pa. St. 75; 30 Atl. 820).

¹ The rule that a person who goes on a railroad track, or proposes to cross it, must use his eyes and his ears to avoid injury; and that if he fails to do so, and is injured, he cannot recover, notwithstanding the negligence of the railroad company,—is not of universal application, but has exceptions under exceptional circumstances (Jennings v. St. Louis, etc. R. Co., 112 Mo. 268; 20 S. W. 490). To the same effect, Continental Imp. Co. v. Stead, 95 U. S.

161; Stackus v. N. Y. Central R. Co. 79 N. Y. 464; Shaw v. Jewett, 86 Id. 616; Kellogg v. N. Y. Central R. Co., 79 Id. 72; Greany v. Long Island R. Co., 101 Id. 419; Chaffee v. Boston, etc. R. Co., 104 Mass. 108; Tyler v. New York, etc. R. Co., 137 Id. 238; Cleveland, etc. R. Co. v. Crawford, 24 Ohio St. 631; Wright v. Cincinnati, etc. R. Co., 94 Ky. 114; 21 S. W. 581 [traveler looked once only]; Hick v. N. Y., New Haven, etc. R. Co., 164 Mass. 424; 41 N. E. 721 [same]. A person is not *necessarily* negligent in going upon a railroad track without looking and listening for approaching trains (Plummer v. Eastern R. Co., 73 Me. 591 [omission to look when stepping on track]; Laverenz v. Chicago, etc. R. Co., 56 Iowa, 689; Nosler v. Chicago, etc. R. Co., 73 Id. 268; 34 N. W. 850). It depends upon the circumstances of the case (Shaber v. St. Paul, etc. R. Co., 28 Minn. 103). It is a question for the jury, under proper instructions (Terre Haute, etc. R. Co. v. Voelker, 129 Ill. 540; 22 N. E. 20; Toledo, etc. R. Co. v. Cline, 135 Ill. 41; 25 N. E. 846). Where trains had no right to run at more than six miles an hour, neglect to look in more than one direction may be excused by a jury (Ramsey v. Louisville, etc. R. Co., 89 Ky. 99; 20 S. W. 162); even if the traveler is expressly warned of danger (Chicago, etc. R. Co. v. Wilson,

so proper a precaution, in most cases, as to be frequently mentioned in terms which imply that it is absolute; but it is not so. Where the traveler has other evidence that it is safe for him to proceed, such as would be entirely convincing to a person of ordinary prudence, he is not absolutely bound to look up and down the track or to listen.² And special circumstances may give him a right to rely so completely upon the railroad company to give him warning, that he may be excused from looking or listening for himself.³ An express invitation from the proper

133 Ill. 55; 24 N. E. 555). Plaintiff, while coming out of defendant's depot, was struck by a train running at high speed on the track between the depot and the passenger platform. Plaintiff testified that he could not see the train because of a car on a side track, and that he had no warning of it, though he listened. There was also evidence that the noise was so great that the sound of the approaching train could not be distinguished. There was some evidence that plaintiff might have escaped had he stopped long enough to look about him. Held error in taking the question of contributory negligence from the jury, and directing a verdict for defendant (Jones v. East Tennessee, etc. R. Co., 128 U.S. 443; 9 S. Ct. 118). In Pennsylvania, it is negligence *per se* for one about to cross a railroad track not to look and listen (Pennsylvania R. Co. v. Beale, 73 Pa. St. 504; Central R. Co. v. Feller, 84 Id. 226; Gerety v. Philadelphia, etc. R. Co., 81 Id. 274; Reading, etc. R. Co. v. Ritchie, 102 Id. 425). See Maryland Central R. Co. v. Neubeur, 62 Md. 391; Davey v. London, etc. R. Co., L. R. 12 Q. B. Div. 70. So held, where safety gates were left open (Greenwood v. Philadelphia, etc. R. Co., 124 Pa. St. 572; 17 Atl. 188). In Texas, it is proper to refuse a charge that it was the duty of deceased to "look and listen for engines and trains before crossing the

track" (International, etc. R. Co. v. Neff, 87 Tex. 303; 28 S. W. 283). It is a question for the jury (Gulf, etc. R. Co. v. Anderson, 76 Tex. 244; 13 S. W. 196).

² Ernst v. Hudson River R. Co., 35 N. Y. 9, 36; Warren v. Fitchburg R. Co., 8 Allen, 227; Spencer v. Illinois Central R. Co., 29 Iowa, 55. See Brown v. N. Y. Central R. Co., 32 N. Y. 597; Paducah, etc. R. Co. v. Hoehl, 12 Bush. [Ky.], 41; Cahill v. Cincinnati, etc. R. Co., 92 Ky. 345; 18 S. W. 2.

³ So held with regard to one who was employed on the track and whose attention was engrossed thereby (Ominger v. N. Y. Central R. Co., 6 Thomp. & C 498; Barton v. N. Y. Central R. Co., 1 Id. 297; Goodfellow v. Boston, etc. R. Co., 106 Mass. 461). It is a question of fact for the jury to say whether plaintiff ought to have looked, or whether, under the circumstances, he might rely on being given timely warning of approaching danger (Mark v. St. Paul, etc. R. Co., 32 Minn. 208). And so held as to passengers entering or leaving trains (Brassell v. N. Y. Central R. Co., 84 N. Y. 241; Terry v. Jewett, 78 Id. 338). A passenger crossing a track at a station in order to leave or board a train, is not held to the same care and diligence as persons crossing tracks, but may assume that he will be safe from harm on the track,

agent of the railroad company to cross,⁴ or an implied invitation, as by opening gates,⁵ or by a flagman making no signal, though seeing the traveler,⁶ is sufficient to support a verdict

which he is thus invited and required to cross (*Weeks v. New Orleans*, etc. R. Co., 40 La. Ann. 800; 5 So. 72; *Pennsylvania Co. v. Keane*, 41 Ill. App. 317; *aff'd* on another point, 32 N. E. 260 [track between train and station]). So also, when crossing to or from an eating station (*Atchison*, etc. R. Co. v. *Shean*, 18 Colo. 368; 33 Pac. 108).

⁴ Where a flagman is stationed to give warning of trains, travelers have a right to rely on his reasonable performance of his duty, and, if he signals them to cross, need not look and listen for a train before crossing the track (*Chicago*, etc. R. Co. v. *Clough*, 134 Ill. 586; 25 N. E. 664; 29 Id. 184; *Alabama*, etc. R. Co. v. *Anderson*, 109 Ala. 299; 19 So. 516; *Henning v. Caldwell*, 63 Hun, 635; 18 N. Y. Supp. 339 [positive direction to cross]). So as to foot passenger (*Waldele v. N. Y. Central R. Co.*, 38 N. Y. Supp. 1009 [traveler invited, and perplexed by tracks]).

⁵ *Glushing v. Sharp*, 96 N. Y. 676 [plaintiff did not continue looking after reaching track]; *Palmer v. N. Y. Central R. Co.*, 112 N. Y. 234; 19 N. E. 678 [doubtful whether deceased looked at all]; *Oldenburg v. N. Y. Central R. Co.*, 124 N. Y. 414; 26 N. E. 1021; *Conaty v. N. Y., New Haven*, etc. R. Co., 164 Mass. 572; 42 N. E. 103. A traveler approaching a railroad crossing guarded by gates is not required to exercise the same vigilance to look and listen as where he approaches one not so guarded (*Kane v. N. Y., New Haven*, etc. R. Co., 132 N. Y. 160; 30 N. E. 256). It is not negligence, as matter of law, after passing under one gate to omit to look at a second gate to see

whether it is falling before passing under it (*Feeney v. Long Island R. Co.*, 116 N. Y., 375; 22 N. E. 402). An instruction that plaintiff was negligent if he approached the crossing with a heavy load, at a trot, though the gates were up, is properly refused where the gateman, by nodding to the plaintiff, invited him to cross (*Clark v. Boston & M. R. Co.*, 164 Mass. 434; 41 N. E. 666). But one familiar with the locality, and having knowledge of the fact that a railroad company was not accustomed to operate its gates between certain hours, who crosses the track between those hours, cannot rely on the open gate as an assurance of safety (*Weed v. N. Y. Central R. Co.*, 91 Hun, 293; 36 N. Y. Supp. 98). And in Maine, it has been held that where a foot-traveler's view of the tracks was unobstructed, and she neither looked nor listened, she could not recover, though gates maintained by the company at the crossing were temporarily in disuse and open (*Romeo v. Boston & Me. R. Co.*, 87 Me. 540; 33 Atl. 24).

⁶ One is not negligent, in approaching a railroad crossing, if he sees the flagman standing at the crossing without a flag (*Robbins v. Fitchburg R. Co.*, 161 Mass. 145; 36 N. E. 752). But where plaintiff's only excuse for not looking was that the keeper of carriage gates, who owed no duty to foot-passengers, gave no warning that a train was coming, held that plaintiff was properly nonsuited (*Davey v. Southwestern R. Co.*, L. R. 11 Q. B. Div. 213; *aff'd*, 12 Id. 70). The omission of a brakeman to warn plaintiff of the approach of a train, is no excuse,

excusing the plaintiff from the usual vigilance in looking or listening for trains, within reasonable limits.⁷ No invitation, however, is any excuse for being oblivious to what is plainly in sight, or for dispensing with the use of ordinary care.⁸ A traveler is not bound, after seeing a train depart out of sight, to watch for its possible speedy return.⁹ He is not necessarily in fault for failing to watch for a train or section of train following another, without warning, and with an interval of only a few seconds.¹⁰ If the track is so obstructed that the traveler cannot see along it, it may be sufficient for him to *listen* for the approach of a train.¹¹ Where the traveler could not have seen or heard anything which would have given him warning, if he had both looked and listened, his omission to do so could not have contributed to his injury.¹² A traveler

without proof that he was stationed there to warn travelers (*Young v. N. Y., Lake Erie, etc. R. Co.*, 107 N. Y. 500; 14 N. E. 434). The absence of a flagman from the crossing at the time, plaintiff having only sometimes seen one there, gave him no right to assume that the crossing was safe, and neither to look nor listen (*Whalen v. N. Y. Central R. Co.*, 58 Hun, 431; 12 N. Y. Supp. 527). One approaching a railroad crossing has no right to rely for his protection solely on the custom of the company to have a flagman at the crossing. He must look and listen, if none is there (*Smith v. Wabash R. Co.*, 141 Ind. 92; 40 N. E. 270).

⁷ These invitations do not justify the entire disuse of sight and hearing, or a blind reliance on signals (*Denver, etc. R. Co. v. Gustafson*, 21 (Colo. 393; 41 Pac. 505).

⁸ *Calbertson v. Metropolitan St. R. Co.*, Mo. ; 36 S. W. 834.

⁹ *Duame v. Chicago, etc. R. Co.*, 72 Wisc. 523; 40 N. W. 394; *Phillips v. Milwaukee, etc. R. Co.*, 77 Wisc. 349; 46 N. W. 543. A traveler approaching a crossing on a dark night, and hearing a locomotive at a con-

siderable distance, is not bound to surmise that it may be backing a train of flat cars towards the crossing, without light or signal thereon (*Chicago, etc. R. Co. v. Sharp*, 11 C. C. A. 337; 63 Fed. 532).

¹⁰ *Breckenfelder v. Lake Shore, etc. R. Co.*, 79 Mich. 560; 44 N. W. 957; [detached cars]; *Grand Rapids, etc. R. Co. v. Cox*, 8 Ind. App. 29; 35 N. E. 183. Where one was killed by a train following another train which had just passed, at a short interval and at high speed, held, that the question of contributory negligence in failing to look for a second train before crossing was for the jury (*McGhee v. White*, 13 C. C. A. 608; 66 Fed. 502). *s. p.*, *French v. Taunton Br. R. Co.*, 116 Mass. 537; *Bowen v. N. Y. Central R. Co.*, 89 Hun 594; 35 N. Y. Supp. 540

¹¹ *Beisiegel v. N. Y. Central R. Co.*, 34 N. Y. 633; see *Mackay v. N. Y. Central R. Co.*, 35 Id. 75, and cases cited under last section. If the view is obstructed, a failure to listen for a train will prevent a recovery (*Union Pac. R. Co. v. Adams*, 33 Kans. 427; 6 Pac. 529).

¹² *Davis v. N. Y. Central R. Co.*, 47 N. Y. 400; *Norfolk, etc. R. Co. v*

who looks is not deemed negligent, as matter of law, simply because he fails to see an approaching train, if it was not generally visible from the highway, even though, if he had looked for the train, at some precise point on the highway, he could have seen it.¹³ Neither is he deprived of all remedy because, when confused by the multiplicity of tracks and trains, or by noise and danger, he fails to see the particular train which injures him.¹⁴ His attention may be so diverted that, quite consistently with due care and prudence, he may fail to look or listen at the proper time; and if so, his omission is excused.¹⁵ And although the plaintiff may have disregarded all rules, and may have crossed the track in a reckless manner, yet if he succeeded in crossing safely, and was injured by the defendant's negligence, while standing in a place which ought to have been one of safety, he may none the less recover.¹⁶ His negligence has not, in such case, contributed to his injury. Passengers in a closed vehicle, crossing a track, are not bound to watch. That is the duty of the carrier; and passengers may assume that he

Burge, 84 Va. 63; 4 S. E. 21; *Struck v. Chicago, etc. R. Co.*, 58 Minn. 298; 59 N. W. 1022. No fault can be imputed for not looking in a direction where nothing could be seen, especially if the obstruction is caused by the defendant itself (*McGuire v. Hudson River R. Co.*, 2 Daly, 76; *Cleveland, etc. R. Co. v. Crawford*, 24 Ohio St. 631). Where the train had no head-light, and made but little noise, and another approaching train had a bright head-light, and made a great noise, held, that it was not to be assumed that deceased did not look or listen for the former train as the evidence tended to show that he could neither have seen nor heard it, and that his attention was necessarily given to the other (*Smedis v. Brooklyn, etc. R. Co.*, 88 N. Y. 13).

¹³ *Massoth v. Delaware, etc. Canal Co.*, 64 N. Y. 524.

¹⁴ *McGovern v. N. Y. Central R. Co.*, 67 N. Y. 417; *Haycroft v. Lake*

Shore, etc. R. Co., 64 Id. 636; *Powell v. N. Y. Central R. Co.*, 22 Hun, 56; *Pennsylvania R. Co. v. Werner*, 89 Pa. St. 59; *Cooper v. Lake Shore, etc. R. Co.*, 66 Mich. 261; 33 N. W. 306; *Chicago, etc. R. Co. v. Luebeck*, 157 Ill. 595; 41 N. E. 897. S. P., *Sherry v. N. Y. Central R. Co.*, 104 N. Y. 652; 10 N. E. 128.

¹⁵ A prudent man's attention may be diverted so that he will fail to look and listen, and it is proper to leave it to the jury to say whether it was negligence to so fail (*Pennsylvania Co. v. Rudel*, 100 Ill. 603; *Smedis v. Brooklyn, etc. R. Co.*, 88 N. Y. 13. S. P., *Barstow v. Berlin*, 34 Wisc. 357; *Thompson v. N. Y. Central R. Co.*, 110 N. Y. 636; 17 N. E. 690 [attention diverted by reckless boy].

¹⁶ *Dobiecki v. Sharp*, 88 N. Y. 203 [decendent crossed in full view of train, but had safely reached platform].

has done so.¹⁷ The "look and listen" rule does not apply to passengers or intending passengers going to or from a station or train upon a path prepared for them by the company.¹⁸ And it does not apply, in all its stringency, to servants employed upon the railroad, who could not fully perform their duties if they stopped to look and listen.¹⁹ Omission to look and listen is not necessarily *gross* negligence.²⁰

§ 478. Obstructions to view.—The traveler's view of a railroad track is often obstructed by the natural formation of the land, by the growth of trees, by the erection of buildings, by trains standing on side-tracks, or by other hindrances, natural or artificial; so that, in many cases, he cannot see an approaching train in time to avoid it. If such an obstruction is caused by the act of the railroad company, that is not of itself independent evidence of negligence, so as to make it liable to one who is injured by its train, so long as such obstruction consists in a lawful use of the company's own premises, as by piling materials upon its land,¹ or standing cars upon its side-tracks.² An obstruc-

¹⁷ A passenger in a street car which is approaching a railroad crossing is under no obligation to look or listen for an approaching train (*McCallum v. Long Island R. Co.*, 38 Hun, 569; *O'Toole v. Pittsburgh, etc. R. Co.*, 158 Pa. St. 99; 27 Atl. 737). Many other cases are cited under § 66, *ante*. It is otherwise where a passenger has full opportunity to advise or control the driver (*Brickell v. N. Y. Central R. Co.*, 120 N. Y. 290; 24 N. E. 449). Plaintiff was riding in a wagon owned and driven by another, at the invitation of the driver. He had no control of the horses, and the wagon was struck by a train at a railroad crossing; if plaintiff had looked and listened, he would have discovered the train in time to have avoided the accident. Question for jury (*Howe v. Minneapolis, etc. R. Co.*, 63 Minn. 71; 64 N. W. 102).

¹⁸ *Warfield v. N. Y., Lake Erie, etc. R. Co.*, 8 N. Y. App. Div. 479; 40 N. Y. Supp. 783; *Terry v. Jewett*, 78

N. Y. 338; *Brassell v. N. Y. Central, etc. R. Co.*, 84 Id. 241.

¹⁹ *Jordan v. Chicago, etc. R. Co.*, 58 Minn. 8; 59 N. W. 633; *Hayes v. Northern Pac. R. Co.*, 20 C. C. A. 52; 74 Fed. 279; *McMarshall v. Chicago, etc. R. Co.*, 80 Iowa, 757; 45 N. W. 1065 [servant of another road, signaling train].

²⁰ *Manley v. Boston, etc. R. Co.*, 159 Mass. 493; 34 N. E. 951; *Sullivan v. N. Y., New Haven, etc. R. Co.*, 154 Mass. 524; 28 N. E. 911.

¹ *Cordell v. N. Y. Central R. Co.*, 70 N. Y. 119.

² The general rule is that a company may place its cars on its side-tracks, and allow them to remain there as long as its business may require (*Wabash, etc. R. Co. v. Hicks*, 13 Ill. App., 407; *Disbrow v. Chicago, etc. R. Co.*, 70 Ill. 246). It is not negligence *per se* for a railroad company to permit cars to stand on its side track, so as to obstruct the view of an approach-

tion of view, however caused, may impose upon the company a duty of increased care and watchfulness in running its trains at that point, and of giving more warning signals than are prescribed by statute;³ and it will often excuse, in a traveler, conduct which might otherwise be deemed negligent.⁴ On the

ing train (*Chicago, etc. R. Co. v. Nelson*, 59 Ill. App. 308; *Dillingham v. Parker*, 80 Tex. 572; 16 S. W. 335). But it may be evidence of negligence, under special circumstances (*Houston, etc. R. Co. v. Stewart* [Tex.], 17 S. W. 33). It has been held that a railroad company has no right to permit hedges, trees or anything else to grow on or over hang its right of way to such a height as to materially obstruct the view of a highway crossing (*Chicago, etc. R. Co. v. Tilton*, 26 Ill. App. 362; *Terre Haute, etc. R. Co. v. Barr*, 31 Id. 57).

³ *Richardson v. N. Y. Central R. Co.*, 45 N. Y. 846. See *Cordell v. Same*, 70 Id. 119; *Sullivan v. Tioga R. Co.*, 44 Hun, 304; *Guggenheim v. Lake Shore, etc. R. Co.*, 66 Mich. 150; 33 N. W. 161; *McGill v. Pittsburgh, etc. R. Co.*, 152 Pa. St. 331; 25 Atl. 540; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496; 7 S. W. 857 [weeds: no signal]. Where the company permits needless obstructions to the view it is its duty to operate its trains with reference to such obstructions, in such manner that travelers whose view is so obstructed, may, by ordinary care, avoid injury (*Chicago, etc. R. Co. v. Hinds*, 56 Kans. 758; 44 Pac. 993; *Crawford v. Delaware, etc. R. Co.*, 56 N. Y. Super. 607; 1 N. Y. Supp. 339; *Chicago R. Co. v. Robinson*, 127 Ill. 9; 18 N. E. 772 [car rapidly passing another discharging passengers]).

⁴ In the following cases plaintiff looked and listened, but view was obstructed. Held, question for jury (*Siegel v. Milwaukee, etc. R. Co.*, 79

Wisc. 404; 48 N. W. 488; *Oldenburg v. N. Y. Central R. Co.* 124 N. Y. 414; 26 N. E. 1021 [standing train]; *Parsons v. N. Y. Central R. Co.* 113 N. Y. 355; 21 N. E. 145 [escaping steam and obstructions to view]; *McDuffie v. Lake Shore, etc. R. Co.*, 98 Mich. 356; 57 N. W. 248 [similar case]; *Petrie v. N. Y. Central R. Co.*, 66 Hun, 282; 21 N. Y. Supp. 159 [cars stood on side track]; *Austin v. Long Island R. Co.*, 69 Hun. 67; 23 N. Y. Supp. 193 [signboard]; *Kelsey v. Staten Island Rapid Transit R. Co.*, 78 Hun, 208; 28 N. Y. Supp. 974; *Meddaugh v. N. Y., Ontario, etc. R. Co.*, 86 Hun, 620; 33 N. Y. Supp. 793; *Neiman v. Delaware, etc. Canal Co.*, 149 Pa. St. 92; 24 Atl. 96 [obstructions to view; noise from adjacent factory]; *Fisher v. Monongahela R. Co.*, 131 Pa. St. 292; 18 Atl. 1016 [pile of freight]; *Baltimore, etc., R. Co. v. Walborn*, 127 Ind. 142; 26 N. E. 207 [cars and buildings]; *Cincinnati, etc. R. Co. v. Grames*, 136 Ind. 39; 34 N. E. 714 [stopped; continued watching]; *N. Y., Chicago etc. R. Co. v. Luebeck*, 157 Ill. 595; 41 N. E. 897 [standing train; many tracks]; *Davis v. Kansas City R. Co.*, 46 Mo. App. 180 [cars on side-track]; *Northern Pac. R. Co. v. Austin*, 12 C. C. A. 97; 64 Fed. 211; *Kenney v. Hannibal, etc. R. Co.*, 105 Mo. 270; 16 S. W. 837. And see further, § 476a, *ante*. Where obstructions make it impracticable to see or hear, looking may be excused (*McKune v. Santa Clara Lumber Co.*, 110 Cal. 480; 42 Pac. 980).

other hand, whatever may be the cause of the obstruction, travelers, seeing it, are bound on their part to use additional precautions for the purpose of ascertaining whether a train is approaching.⁵ Thus, one who is driving a horse should, if prevented from seeing the approach of a train until he comes to the edge of the track, drive slowly, keeping his horse under full control, so that he can stop at any moment, if necessary, looking and listening whenever he can usefully do so. But if these precautions fail to protect him, he will be held free from contributory negligence.⁶ If such obstructions are unlaw-

⁵ Cases cited under § 476, *ante*; Louisville, etc. R. Co. v. Stommel, 126 Ind. 35; 25 N. E. 863 [care proportioned to danger]; Louisville, etc. R. Co. v. French, 69 Miss. 121; 12 Co. 338; Hayden v. Missouri, etc. R. Co., 124 Mo. 566; 28 S. W. 74 [high prairie grass]; Norfolk, etc. R. Co. v. Stone, 88 Va. 310; 13 S. E. 432 [deep cut]; St. Louis, etc. R. Co. v. Tippet, 56 Ark. 457; 20 S. W. 161; Atchison, etc. R. Co. v. Townsend, 39 Kans. 115; 17 Pac. 804; Owens v. Pennsylvania R. Co., 41 Fed. 187. Where the view of the track from the highway is obstructed, or the crossing is in other respects especially dangerous, it is the duty of a traveler, aware of such facts, to exercise a higher degree of care than when the view is unobstructed; and if he cannot otherwise satisfy himself that it is prudent to cross he must stop and listen before driving on the track (Chicago, etc. R. Co. v. Crisman, 19 Colo. 30; 34 Pac. 286). *s. p.*, Houghton v. Chicago, etc. R. Co., 99 Mich. 308; 58 N. W. 314 [train known to be due]; Seefeld v. Chicago, etc. R. Co., 70 Wisc. 216; 35 N. W. 278 [same]; Clark v. Northern Pac. R. Co., 47 Minn. 380; 50 N. W. 365; Chicago, etc. R. Co. v. Williams, 56 Kans. 333; 43 Pac. 246. But just where he should stop, is for the jury (Smith v. Baltimore, etc. R. Co., 158 Pa. St. 82; 27 Atl. 847). Where

the view of a track is so obstructed by sunflowers, negligently permitted to grow on the depot grounds, that a driver could not see an approaching train until nearly on the track, but could have heard the whistle if it had been sounded at suitable distances, it cannot be declared, as a matter of law, that it was his duty to stop before driving upon the track (Chicago, etc. R. Co. v. Hinds, 56 Kans. 758; 44 Pac. 993). *s. p.*, Cincinnati, etc. R. Co. v. Farra, 66 Fed. 496; 13 C. C. A. 602 [undergrowth and banks: listened, but could not see]. And there is no duty to stop and look at a point from which the train would not be visible (Kenney v. Hannibal, etc. R. Co., 105 Mo. 270; 15 S. W. 983; 16 Id. 837; Kelsey v. Staten Island R. Co., 78 Hun, 208; 28 N. Y. Supp. 974). Plaintiff heard the whistle of an approaching train, where his view of the track was obstructed, but drove on with his team, thinking he could get across. Held, he could not recover (Pennsylvania Co. v. Morel, 40 Ohio St. 338). To same effect, Gothard v. Alabama, etc. R. Co., 67 Ala. 114; Haas v. Grand Rapids, etc. R. Co., 47 Mich. 401.

⁶ There was evidence that plaintiff, driving slowly and with a safe horse, stopped at a point more than 600 feet from the crossing, from which

fully placed upon the highway by the company, that may be considered as an element in proof of its negligence.⁷ Where the obstruction is a moving train which, in an inconsiderable time, would pass, the traveler ought to wait for it to pass or look beyond it; and should not proceed, without looking, upon the instant of its moving;⁸ and when the only obstruc-

a train could be seen, to look or listen, but, neither seeing nor hearing anything, drove slowly up a hill to a point between 40 and 50 yards from the track, where she again stopped and listened, but, hearing nothing, she then drove slowly down the hill, listening all the time, and that when the horse had his feet on the nearest rail, the train, which was behind time, came round a curve. Between the point at which plaintiff first stopped and the crossing, there was no point from which the track could be seen, and the train did not whistle as required by law. Held, that plaintiff was not, as matter of law, negligent (Baltimore, etc. R. Co. v. Griffith, 159 U. S. 603; 16 S. Ct. 105). Where the view of track was obstructed by high ground, a building and piles of wood on both sides, which the company had placed there, so that the train could not be seen by deceased until his horses were on the track, and then only for about 60 rods; Held, it not being clear that deceased heard either whistle or bell, there was no negligence on his part (Mackay v. N. Y. Central R. Co., 35 N. Y. 75). To same effect, *Hermans v. N. Y. Central R. Co.*, 63 Hun, 625; 17 N. Y. Supp. 319 [view obstructed by box cars]; *Hubbard v. Boston & Alb. R. Co.*, 162 Mass. 132; 38 N. E. 366 [ledge of rock]; *Goodenough v. Pennsylvania R. Co.*, 55 N. J. Law, 596 [buildings and trees]; *Chicago, etc. R. Co. v. Lee*, 87 Ill. 454; *Bower v. Chicago, etc. R. Co.*, 61 Wisc. 457;

Loucks v. Chicago, etc. R. Co., 31 Minn. 526; *Faber v. St. Paul, etc. R. Co.*, 29 Id. 465; *Schum v. Pennsylvania R. Co.*, 107 Pa. St. 8; *Funstons v. Chicago, etc. R. Co.*, 61 Iowa, 452; *Strong v. Sacramento, etc. R. Co.*, 61 Cal. 326). Compare *Cleveland, etc. R. Co. v. Crawford*, 24 Ohio St. 631; *Chicago, etc. R. Co. v. Starmer*, 26 Neb. 630; 42 N. W. 706; *Pittsburgh, etc. R. Co. v. Burton*, 139 Ind. 357; 37 N. E. 150; 38 Id. 594 [horses frightened]; see *Reed v. Chicago, etc. R. Co.*, 74 Iowa, 188; 37 N. W. 149; *Gulf, etc. R. Co. v. Shieder*, 88 Tex. 152; 30 S. W. 902 [standing cars]; *Craze v. Michigan Central R. Co.*, Mich. ; 65 N. W. 527 [fence and vegetation]; *Atchison, etc. R. Co. v. Hill*, 57 Kans. 139; 45 Pac. 581; [weeds and willows]. Though a person injured was familiar with the dangers of the crossing, it is a question for the jury whether he was guilty of contributory negligence, where buildings required one to be very near the track to observe an approaching train; he stopped, looked and listened; fog obstructed the view; the train was running very fast and no signals were given (*Wilcox v. N. Y., Lake Erie, etc. R. Co.*, 88 Hun, 263; 34 N. Y. Supp. 744).

⁷ So held where the company piled wood on the highway contrary to law (*Mackay v. N. Y. Central R. Co.*, 35 N. Y. 75).

⁸ It is contributory negligence to go on a railroad where there are double tracks, after a train has just passed,

tion is smoke or dust, the traveler should wait a reasonable time for it to pass away.⁹

§ 479. **Crossing when highway is blocked.**—A difficult question arises when a highway is completely blocked up by a train standing across it, for an unreasonable length of time, yet ready to start at any moment. The company has, of course, no right to do this.¹ There is obvious risk in any attempt to pass through the train, yet travelers might be indefinitely delayed by waiting for it to move. In Massachusetts, it is held that they must thus wait, and content themselves with an action against the company for the delay.² But the true rule is, as elsewhere established, that it is not negligence for a traveler to cross by the only path left open to him, whether by climbing over a platform,³ or walking between two separated

without waiting until it had gone sufficiently far to give a view of the other track (*Purdy v. N. Y. Central R. Co.*, 87 Hun, 97; 33 N. Y. Supp. 952; *Fletcher v. Fitchburg R. Co.*, 149 Mass. 127; 21 N. E. 302; *Hughes v. Delaware, etc. Canal Co.*, 176 Pa. St. 254; 35 Atl. 190; *Hamm v. N. Y. Central R. Co.*, 50 N. Y. Superior, 78).

⁹ *Heaney v. Long Island R. Co.*, 112 N. Y. 122; 19 N. E. 422; *Beynon v. Pennsylvania R. Co.*, 168 Pa. St. 642; 32 Atl. 84; *Oleson v. Lake Shore, etc. R. Co.*, 143 Ind. 405; 42 N. E. 736; *Lortz v. N. Y. Central R. Co.*, 83 Hun, 271; 31 N. Y. Supp. 1033. s. p., smoke from a factory (*Foran v. N. Y. Central R. Co.*, 64 Hun, 510; 19 N. Y. Supp. 417.) So held as to a cloud of dust (*Chicago, etc. R. Co. v. Fisher*, 49 Kans. 460; 30 Pac. 462).

¹ *Pittsburgh, etc. R. Co. v. Sponier*, 85 Ind. 165; *Lake Erie, etc. R. Co. v. Mackey*, 53 Ohio St. 370; 41 N. E. 980; *Pittsburgh, etc. R. Co. v. Kitely*, 118 Ind. 152; 20 N. E. 727.

² *Gahagan v. Boston, etc. R. Co.*, 1 Allen, 187. Such suggestions are surely fine examples of judicial humor. After two or three years'

litigation, the plaintiff might possibly recover damages to the amount of twenty-five cents. In *Wyatt v. Great Western R. Co.* (6 Best & S. 709), where a railway company, required by statute to have gates at level crossings, provided no persons to open them, and the plaintiff, finding no person in attendance to open the gates, opened them himself, and was injured in consequence, held, he had no right of action. We suppose that he was bound to stand there all night, like a horse, waiting for some superior intelligence to open the gate. Or perhaps it was his duty to walk down to London and request the directors to send a man back with him for that purpose.

³ *Rauch v. Lloyd*, 31 Pa. St. 358; *Henderson v. St. Paul, etc. R. Co.*, 52 Minn. 479; 55 N. W. 53. Where detached cars have been left standing for more than an hour across a public street, and a person approaching, who, after using care to discover whether there is danger of the cars moving, and finding none, attempts to cross over the platform, and is injured, held, contributory negligence a question for the jury (*Weber v.*

cars,⁴ or behind a train, so long as he takes no greater risk than a man of ordinary prudence, acting in a prudent spirit, would take.⁵ But it is negligent, when an engine is attached to a train, to climb over car-bumpers or other parts of cars which no prudent man would venture upon under similar circumstances.⁶ It is

Atchison, etc. R. Co., 54 Kans. 389; 38 Pac. 569). The train had stood for half an hour; a brakeman told plaintiff to climb "right across the train," and crossing in front or rear of the train would have been difficult. Held, that a nonsuit was properly denied (*Phillips v. N. Y. & New England R. Co.*, 80 Hun, 404; 30 N. Y. Supp. 333).

⁴ Where the plaintiff walked between two sections of a divided train, the question was held to be for the jury (*Baltimore, etc. R. Co. v. Fitzpatrick*, 35 Md. 32; *Dahlstrom v. St. Louis, etc. R. Co.*, 108 Mo. 525; 18 S. W. 919 [cars 25 feet apart]; *Grant v. Baltimore, etc. R. Co.*, 2 MacArthur, 277 [between freight cars]. *S. P., Lake Erie, etc. R. Co. v. Mackey*, 53 Ohio St. 370; 41 N. E. 980; *Cleveland, etc. R. Co. v. Keely*, 138 Ind. 600; 37 N. E. 406). So, also, where he drove between two sections of train 20 feet apart (*Pennsylvania R. Co. v. Horst*, 110 Pa. St. 226; 1 Atl. 217). But in *Lake Shore, etc. R. Co. v. Clemens* (5 Ill. App. 77), it was held to be grossly negligent to attempt to drive between the parts of a train which had opened to allow other trains to pass. And so in *Missouri*, it has been held that where a train obstructed the street crossing for a considerable time, and plaintiff was crushed while trying to pass between the rear of the train and the rear of another train, there could be no recovery (*Stillson v. Hannibal, etc. R. Co.*, 67 Mo. 671). So, also, where deceased, crossing a railroad yard by license, tried to pass through an opening of a few feet between cars

left standing while another car was switched off, when there was nothing to indicate that the opening was for the purpose of passing through (*Flynn v. Eastern R. Co.*, 83 Wisc. 238; 53 N. W. 494).

⁵ The doctrine of voluntary assumption of risks does not apply to the case of one who exercises ordinary care in attempting to pass by the rear of a standing train, which wrongfully obstructs most of the street (*Chicago, etc. R. Co. v. Prescott*, 59 Fed. 237; 8 C. C. A. 109). It is error to refuse to charge that if a man of ordinary care would have seen that it was hazardous to cross between the cars, and would not have attempted to cross as deceased did, the jury must find for defendant (*Gulf, etc. R. Co. v. Hamilton*, Tex. Civ. App. ; 28 S. W. 906). For a hard and doubtful case, see *Howard v. Kansas City, etc. R. Co.*, 41 Kans. 403; 21 Pac. 267 [climbing over train, where crossing blocked for long time].

⁶ *Magoon v. Boston, etc. R. Co.*, 67 Vt. 177; 31 Atl. 156 [climbing over bumpers]; *O'Mara v. Delaware, etc. Canal Co.*, 18 Hun, 192 [same]; *Bird v. Flint, etc. R. Co.*, 86 Mich. 79; 48 N. W. 691 [woman doing same]; *Lake Shore, etc. R. Co. v. Pinchin*, 112 Ind. 592; 13 N. E. 677 [over drawbars of freight train, ready to move]; *Hudson v. Wabash Western R. Co.*, 123 Mo. 445; 27 S. W. 717 [climbing over pin head]; *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211; 16 S. W. 11 [space between cars barely wide enough to squeeze through]; *Hudson v. Wabash R. Co.*, 101

unquestionably negligence of a gross degree to pass *under* cars.⁷

§ 480. Traveling along the track.—When a railroad is laid *along a highway*, and its cars are restricted to a moderate speed, such as ordinary vehicles use, travelers have the same right to drive or walk upon it that they would have if the track were not there; and the rights of both parties are equal.¹ If a sufficient sidewalk is provided, walking upon the track may be negligent, for the same reason that walking in the middle of an ordinary highway would be.² Travelers have a right to ride or drive along the track in such cases, even though there is abundant room in other parts of the road.³ But, in the exercise of this right, and in every case in which he is lawfully on the track, a traveler must use more care than he would if

Mo. 13; 14 S. W. 15 [over coupling pins]; Wherry v. Duluth, etc. R. Co., 64 Minn. 415; 67 N. W. 223 [climbing between freight cars]; Bollinger v. Texas, etc. R. Co., 47 La. Ann. 721; 17 So. 253 [climbing through open freight car]; Atchison, etc. R. Co. v. Plaskett, 47 Kans. 112; 27 Pac. 824 [freight train stopped one minute, boy climbed over cars; no liability]. But where it is customary to climb over bumpers, and the engineer sees plaintiff doing it, recovery may be had, if train is suddenly started (Henderson v. St. Paul, etc. R. Co., 52 Minn. 479; 55 N. W. 53). To similar effect, when people are walking between cars, Burger v. Missouri Pac. R. Co., 112 Mo. 238; 20 S. W. 439.

¹ Chicago, etc. R. Co. v. Dewey, 26 Ill. 255; Chicago, etc. R. Co. v. Coss, 73 Id. 394; Smith v. Chicago, etc. R. Co., 55 Iowa, 33; 7 N. W. 398; Ostertag v. Pacific R. Co., 64 Mo. 421; Memphis, etc. R. Co. v. Copeland, 61 Ala. 376; Central R. Co. v. Dixon, 42 Ga. 327; McMahon v. Northern Central R. Co., 39 Md. 438; Rumpel v. Oregon, etc. R. Co., Idaho, ; 35 Pac. 700; Chi-

cago, etc. R. Co. v. Sykes, 1 Ill. App. 520 [direction by conductor no excuse].

² So held, as to ordinary street railroads (Fash v. Third Ave. R. Co., 1 Daly, 148; Wilbrand v. Eighth Ave. R. Co., 3 Bosw. 314); and so also as to steam railroads (Alabama, etc. R. Co. v. Chapman, 80 Ala. 615; 2 So. 738; Louisville, etc. R. Co. v. Phillips, 112 Ind. 59; 13 N. E. 132; Pittsburgh, etc. R. Co. v. Bennett, 9 Ind. App. 92; 35 N. E. 1033; Eswin v. St. Louis, etc. R. Co., 96 Mo. 290; 9 S. W. 577).

³ One who was injured by walking on a street-car track, without the exercise of ordinary care to avoid an approaching car, cannot recover for the injury, if the driver uses reasonable diligence to avoid the accident (Smith v. Crescent City R. Co., 47 La. Ann. 833; 17 So. 302). s. p., Kelly v. Hendrie, 26 Mich. 255; Johnson v. Canal, etc. R. Co., 27 La. Ann. 53; Chicago, etc. R. Co. v. Bert, 69 Ill. 388; Wilbrand v. Eighth Ave. R. Co., 3 Bosw. 314.

⁴ Fash v. Third Ave. R. Co., 1 Daly, 148.

he were not on the track. He must give way to every approaching car, because he can, and the cars cannot, travel off the track;⁴ he must keep a sharp watch for the approach of cars;⁵ and failing to do this, he is guilty of negligence. He is bound to take every precaution which reasonable prudence would suggest. And a traveler who walks along the same track upon which a train is rapidly approaching, in full view, is seriously in fault.⁶ The use of a railroad track, cutting or embankment, *not* occupying a highway or being at lawful crossings of public

⁴ "The true rule is that the company is entitled to the unrestricted use of its rails for the progress of its cars within that limit of speed which the law allows them; and that, as between them and the driver of any other vehicle who may be upon their track in front of one of their cars, the latter, being unnecessarily there, must exercise more care than he would if he were upon a common pavement, to see that an approaching car is not impeded, and if, through negligence or willfulness on his part in this respect, a collision ensues, he should not have damages against the company, even if the latter is also in fault" (Slosson, J., *Wilbrand v. Eighth Ave. R. Co.*, 3 Bosw. 314). But this does not justify a forcible ejection of vehicles from the track (*Fettritch v. Dickenson*, 22 How. Pr. 248). A person who, while walking along a street car track, sees a car approaching, but does not get out of the way, though he had ample time to do so, is guilty of contributory negligence (*Jager v. Coney Island, etc. R. Co.*, 84 Hun, 307; 32 N. Y. Supp. 304).

⁵ *Meek v. Pennsylvania R. Co.*, 38 Ohio St. 632. The driver of a team on street railroad track is bound to look *behind* him for cars (*Adolph v. Central Park, etc. R. Co.*, 76 N. Y. 530). But not so as to one riding a bicycle; because he cannot look

behind him, unless extremely expert (*Rooks v. Houston St. R. Co.*, 10 N. Y. App. Div. 98). In that case, no warning was given by the motor-man. In *Everett v. Los Angeles R. Co.* (115 Cal. 105; 43 Pac. 207), the bicyclist did not *listen*, or he would have heard the gong of the car. The *dictu* of the court, holding that a cyclist is bound to look backwards, show that the judges never rode on a wheel, and they are of no authority. One who drives his team so near to a street-car track that it is struck by a passing car is guilty of contributory negligence (*Spaulding v. Jarvis*, 32 Hun, 621). One who, having passed a train standing on a track in the public street, walks along on the track behind it, though no trespasser, is bound to watch the train, and listen for signals, on the chance that it may back (*Bryson v. Chicago, etc. R. Co.*, 89 Iowa, 677; 57 N. W. 430).

⁶ *Evansville, etc. R. Co. v. Hiatt*, 17 Ind. 102 [train only going four miles per hour]. See, also, *Indianapolis, etc. R. Co. v. McClaren*, 62 Id. 566; *Houston v. Vicksburg, etc. R. Co.*, 39 La. Ann. 796; 2 So. 562. It is of no consequence that the train was running at a greater speed than allowed by law, and that defendant's engineer might have seen plaintiff, if he did not in fact (*Mobile, etc. R. Co. v. Stroud*, 64 Miss. 784; 2 So. 171).

roads or highways, is exclusively for the company and its employees,⁷ and it is, therefore, a trespass and evidence of contributory negligence to travel lengthwise upon it, without permission,⁸ even though it is entirely unenclosed and opens upon a highway,⁹ and still more so, if it is properly inclosed or

⁷ Philadelphia, etc. R. Co. v. Hummell, 44 Pa. St. 375; see Remer v. Long Island R. Co., 36 Hun, 253. In an action for the death of a person walking on a railroad, where the track was defendant's main line, and it did not appear that it was in a public street, and so incorporated with it as to form part of the roadway itself, deceased was a trespasser (Louisville, etc. R. Co. v. Hairston, 97 Ala. 351; 12 So. 299).

⁸ In all the following cases, where plaintiff walked along track, without permission, it was held, as matter of law, that he could not recover; although the train was negligently managed: Matthews v. Philadelphia, etc. R. Co., 161 Pa. St. 28; 28 Atl. 936 [no signals]; Ham v. Delaware, etc. Canal Co., 142 Pa. St. 617; 21 Atl. 1012 [intoxication no excuse for taking track instead of highway]; Baltimore, etc. R. Co. v. State, 69 Md. 551; 16 Atl. 212 [unlawful speed in city]; Norfolk, etc. R. Co. v. Carper, 88 Va. 556; 14 S. E. 328 [engineer made all efforts to stop train]; Matthews v. Atlantic, etc. R. Co., 117 N. C. 640; 23 S. E. 177 [too near track]; Richmond, etc. R. Co. v. Watts, 92 Ga. 88; 17 S. E. 983 [watchman of another company, using track without permission]; Central R. Co. v. Smith, 78 Ga. 694; 3 S. E. 397 [no signals]; Central R. Co. v. Raiford, 82 Ga. 400; 9 S. E. 169 [no signals]; Eastern Ky. R. Co. v. Powell, Ky.; 33 S. W. 629 [no headlight on engine]; Louisville, etc. R. Co. v. Schmetzer, 94 Ky. 424; 22 S. W. 603 [same, but no fault in company]; Patton v. East Tennes-

see, etc. R. Co., 89 Tenn. 370; 15 S. W. 919 [train breaking]; Parker v. Pennsylvania Co., 134 Ind. 673; 34 N. E. 504 [unlawful speed]; McDonald v. Chicago, etc. R. Co., 75 Wisc. 121; 43 N. W. 744 [driving on track two miles, at night, is gross negligence]; Tennis v. Interstate, etc. R. Co., 45 Kans. 503; 25 Pac. 876 [no signals or effort to stop train]; Gulf, etc. R. Co. v. York, 74 Tex. 364; 12 S. W. 68 [walking on ties, "looking straight down"]; Missouri Pac. R. Co. v. Porter, 73 Tex. 304; 11 S. W. 324 [no signals]; Toomey v. Southern Pac. R. Co., 86 Cal. 374; 24 Pac. 1074 [no signals]. It is negligence *per se* for a licensee to walk on or near a track in a railroad yard when it is admitted that he could have walked safely by the side of such track (Tucker v. Baltimore, etc. R. Co., 8 C. C. A. 416; 59 Fed. 968). A policeman authorized by a company to patrol its tracks is a trespasser in walking thereon for his own convenience on his way to enter on the discharge of his duties (Pennsylvania Co. v. Meyers, 136 Ind. 242; 36 N. E. 32). The constitutional declaration that railroads are "public highways" does not authorize the use of railroad tracks by pedestrians (Hyde v. Missouri Pac. R. Co., 110 Mo. 272; 19 S. W. 483).

⁹ Pittsburgh, etc. R. Co. v. Collins, 87 Pa. St. 405; Baltimore & Ohio R. Co. v. Sherman, 30 Gratt. 602; Chicago, etc. R. Co. v. Olson, 12 Ill. App. 245; Bresnahan v. Mich. Central R. Co., 49 Mich. 410; Grethen v. Chicago, etc. R. Co., 22 Fed. 609; Van Schaick v. Hudson River R. Co.,

separated from all highways.¹⁰ So is standing upon the track,¹¹ especially behind a train, even if stationary.¹² Lying down upon a railroad is obviously the grossest negligence, which nothing can well excuse.¹³ Those who travel along the track

43 N. Y. 527; *Delaney v. Milwaukee, etc. R. Co.*, 33 Wisc. 67; *Phillips v. East Tennessee, etc. R. Co.*, 87 Ga. 272; 13 S. E. 644. Plaintiff was injured while walking on a track laid on a city street, not graded. There was a path between the tracks, and one outside, on either of which plaintiff would have been safe. No recovery (*Ill. Central R. Co. v. Hall*, 72 Ill. 222). Such an act is particularly negligent if the person is deficient in sight or hearing (*Laicher v. New Orleans, etc. R. Co.*, 28 La. Ann. 320; *Cogswell v. Oregon, etc. R. Co.*, 6 Oreg. 417). See *Terre Haute, etc. R. Co. v. Graham*, 46 Ind. 239; *Murphy v. Wilmington, etc. R. Co.*, 70 N. C. 437).

¹⁰ See *Harty v. Central R. Co.*, 42 N. Y. 468; *Finlayson v. Chicago, etc. R. Co.*, 1 Dill. 579; *Ill. Central R. Co. v. Hetherington*, 83 Ill. 510; *Ill. Central R. Co. v. Godfrey*, 71 Id. 500; *McAllister v. Burlington, etc. R. Co.*, 64 Iowa, 395; *Carlin v. Chicago, etc. R. Co.*, 37 Id. 316; *Ivens v. Cincinnati, etc. R. Co.*, 103 Ind. 27; *Terre Haute, etc. R. Co. v. Graham*, 46 Id. 239; *Frech v. Philadelphia, etc. R. Co.*, 39 Md. 574; *Savannah, etc. R. Co. v. Meadors*, 95 Ala. 137; 10 So. 141 [cutting, nowhere used as crossing]. It is held to be negligence for a person to run along the track in pursuit of a departing train, even though he has paid his fare for passage thereon (*Perry v. Central R. Co.*, 66 Ga. 746; *Weeks v. New Orleans, etc. R. Co.*, 40 La. Ann. 800; 5 So. 72); and still greater negligence to run or ride in front of a train, even in an attempt to reach a crossing (*Tanner v. Louis-*

ville, etc. R. Co., 60 Ala. 621). Walking over a trestle bridge, with no provision on it for walkers, and known to be used by trains, is usually deemed gross negligence (*Va. Midland R. Co. v. Barksdale*, 82 Va. 330; *Glass v. Memphis, etc. R. Co.*, 94 Ala. 581; 10 So. 215; *May v. Central R. Co.*, 80 Ga. 363; 4 S. E. 330; *Savannah, etc. R. Co. v. Stewart*, 71 Ga. 427; *Anderson v. Chicago, etc. R. Co.*, 87 Wisc. 195; 58 N. W. 79; *Mason v. Mo. Pacific R. Co.*, 27 Kans. 83; *Lewis v. Puget Sound R. Co.*, 4 Wash. St. 188; 29 Pac. 1061); especially if done with knowledge that a train is momentarily expected thereon (*Bentley v. Georgia Pac. R. Co.*, 86 Ala. 484; 6 So. 37).

¹¹ *Hale v. Columbia, etc. R. Co.*, 34 S. C. 292; 13 S. E. 537 [no signals]; *Dooley v. Mobile, etc. R. Co.*, 69 Miss. 648; 12 So. 956; *Texas, etc. R. Co. v. Hare*, 4 Tex. Civ. App. 18; 23 S. W. 42 [boy confused: no excuse]; *Diebold v. Pennsylvania R. Co.*, 50 N. J. Law, 478; 14 Atl. 576 [statute]. So held, where plaintiff stood between tracks (*Schmidt v. Philadelphia, etc. R. Co.*, 149 Pa. St. 357; 24 Atl. 218; *Watts v. Richmond, etc. R. Co.*, 89 Ga. 277; 15 S. E. 365, where plaintiff was held to be no trespasser).

¹² *Van Schaick v. Hudson River R. Co.*, 43 N. Y. 527. S. P., *Lofdahl v. Minneapolis, etc. R. Co.*, 88 Wisc. 421; 60 N. W. 795.

¹³ *Murch v. Western N. Y., etc. R. Co.*, 78 Hun, 601; 29 N. Y. Supp. 490; *Goodwin v. Central R. Co.*, 96 Ala. 445; 11 So. 393; *Raden v. Georgia C. Co.*, 78 Ga. 47; *Houston, etc. R. Co. v. Smith*, 77 Tex. 179; 13

of a steam railroad by permission, must vigilantly look and listen, both in front and rear, for trains.¹⁴ Much more is this duty incumbent upon mere trespassers.¹⁵ What extent of toleration will amount to a license, is a question of real-estate law, which we will not here discuss.¹⁶

S. W. 972; *Missouri Pac. R. Co. v. Brown* [Tex.] 18 S. W. 670; *Louisville, etc. R. Co. v. Burke*, 6 Coldw. 45; *O'Keefe v. Chicago, etc. R. Co.*, 32 Iowa, 467; *Ill. Central R. Co. v. Hutchinson*, 47 Ill. 408; *Herring v. Wilmington, etc. R. Co.*, 10 Ired. Law, 402; *Sims v. Macon, etc. R. Co.*, 28 Ga. 93; see *Holmes v. Central R. Co.*, 37 Id. 593; *Felder v. Louisville, etc. R. Co.*, 2 McMullan, 403; *Richardson v. Wilmington, etc. R. Co.*, 8 Rich. Law, 120; *Southwestern R. Co. v. Johnson*, 60 Ga. 667. For a peculiar case of this kind see *Virginia, etc. R. Co. v. Boswell*, 82 Va. 932; 7 S. E. 383. Judgment reversed for an extraordinary charge on this point (*White v. Augusta, etc. R. Co.*, 30 S. C. 218; 9 S. E. 96).

¹⁴ *Louisville, etc. R. Co. v. Hairs-ton*, 97 Ala. 351; 12 So. 299; *Louisville, etc. R. Co. v. Crawford*, 89 Ala. 240; 8 So. 243 [flagman must look both ways]; *Meredith v. Richmond, etc. R. Co.*, 108 N. C. 616; 13 S. E. 137; *Richards v. Chicago, etc. R. Co.*, 81 Iowa, 426; 47 N. W. 63 [must look behind]; *Evansville, etc. R. Co. v. Hiatt*, 17 Ind. 102. One driving a hand-car along a railroad must keep constant watch for the approach of trains, and cannot recover for injuries suffered through his failure to do so, even though he did not know that there was any danger (*Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186). A policeman authorized to patrol and keep tramps off track is not absolved from the duty of exercising due care (*Pennsylvania Co. v. Meyers*, 136 Ind. 242; 36 N. E. 32). The

fact that the noise made by a saw-mill, running near a railroad track, interfered with the hearing of a person walking thereon, increased his obligation to look for approaching trains (*Schmolze v. Chicago, etc. R. Co.*, 83 Wisc. 659; 53 N. W. 743).

¹⁵ *McAdoo v. Richmond, etc. R. Co.*, 105 N. C. 140; 11 S. E. 316; *Martín v. Georgia R. Co.*, 95 Ga. 361; 22 S. E. 626; *Bouwmeester v. Grand Rapids, etc. R. Co.*, 67 Mich. 87; 34 N. W. 414; *Schmolze v. Chicago, etc. R. Co.*, 83 Wisc. 659; 53 N. W. 743; *Candelaria v. Atchison, etc. R. Co.* [N. Mex.], 27 Pac. 497.

¹⁶ What evidence will not suffice to prove a license to use the track; see *Anderson v. Chicago, etc. R. Co.*, 87 Wisc. 195; 58 N. W. 79 [trestle, unplanked, long and narrow]; *Savannah, etc. R. Co. v. Meadors*, 95 Ala. 137; 10 So. 141 [custom to walk on railroad at other places than public highways or crossings inadmissible]; *Burg v. Chicago, etc. R. Co.*, 90 Iowa, 106; 57 N. W. 680 [evidence of user inadmissible]; *White v. Central Railroad*, 83 Ga. 595; 10 S. E. 273 [custom no justification]; *Blanchard v. Lake Shore, etc. R. Co.*, 126 Ill. 416; 18 N. E. 799 [same]; *Missouri Pac. R. Co. v. Brown* [Tex.], 18 S. W. 670 [nothing done to prevent walking on track]; *Ward v. Southern Pac. Co.*, 25 Oreg. 433; 36 Pac. 166 [same]; *Missouri Pac. R. Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641 [same]. Evidence that the public had habitually used part of defendant's railroad track was properly excluded, there being

§ 481. Infirm persons.—Persons who are not in the full possession of their faculties are bound to use additional precautions, so far as may be reasonably within their power, to supply the deficiency, so as not to expose themselves to greater risk than other persons do. Those who are deficient in any one of their senses must all the more diligently use the others.¹

no evidence that defendant had ever authorized such use (*Hoskins v. Louisville, etc. R. Co.*, 97 Ky. 364; 30 S. W. 643). Acquiescence in the use of track and embankment as a high-way does not confer a right or license so to use it (*Brown v. Louisville, etc. R. Co.*, 97 Ky. 228; 30 S. W. 639). What evidence of license may go to the jury; see *Johnson v. Lake Superior R. Co.*, 86 Wisc. 64; 56 N. W. 161 [constant use; absence of other path]; *Pomponio v. N. Y., New Haven, etc. R. Co.*, 66 Conn. 528; 34 Atl. 491 [same]; *Norfolk, etc. R. Co. v. De Board*, 91 Va. 700; 22 S. E. 514 [constant use; no objection]; *Cleveland, etc. R. Co. v. Adair*, 12 Ind. App. 569; 39 N. E. 672; 40 Id. 822 [same]; *Hammill v. Louisville & N. R. Co.*, 93 Ky. 343; 20 S. W. 263 [railroad servant, using bridge as way of necessity to work]. The fact that pedestrians are accustomed to travel on a railroad at a particular place, makes it the duty of the railroad company to exercise greater caution and prudence in the operation of its road at that place (*Nuzum v. Pittsburgh, etc. R. Co.*, 30 W. Va. 228; 4 S. E. 243; *Cahill v. Chicago, etc. R. Co.*, 22 C. C. A. 184; 74 Fed. 285 [same: thousands crossing daily]; *Roth v. Union Depot Co.*, 13 Wash. St. 525; 43 Pac. 641; 44 Pac. 253 [50 daily]; *Wabash R. Co. v. Jones*, 53 Ill. App. 125 [people of village]). Plaintiff's intestate was standing near the track, unloading wood to defendant, when struck by one of its engines. He was using the track and roadbed as others had done.

Question of contributory negligence was for the jury (*Felch v. Concord R. Co.* 66 N. H. 318; 29 Atl. 557). Under evidence that a large number of people crossed defendant's right of way at a certain point at all hours of the day, the question whether plaintiff was at such a point on the right of way with the company's consent is for the jury, though defendant's witnesses testify that the company boarded up the right of way, and did everything in its power to warn people from crossing it (*Hansen v. Southern Pac. Co.*, 105 Cal. 379; 38 Pac. 957). In *Murray v. Fitchburg R. Co.* (165 Mass. 448; 43 N. E. 190), a servant of the company was held not in fault, as matter of law, for being on the track; and so as to the servant of another company, using track in customary way (*McMarshall v. Chicago, etc. R. Co.*, 80 Iowa, 757; 45 N. W. 1065). A statute which makes it unlawful to walk along the track of a railroad, does not apply to a licensed path in and about depot grounds (*Mason v. Chicago, etc. R. Co.*, 89 Wisc. 151; 61 N. W. 300).

¹ *Hayes v. Michigan, etc. R. Co.*, 111 U. S. 228; *Elkins v. Boston, etc. R. Co.*, 115 Mass. 190; *Butterfield v. Western, etc. R. Co.*, 10 Allen, 532; *Steves v. Oswego, etc. R. Co.*, 18 N. Y. 422; *Hanover, etc. R. Co. v. Coyle*, 55 Pa. St. 396; *Central, etc. R. Co. v. Feller*, 84 Id. 226; *Morris, etc. R. Co. v. Haslan*, 33 N. J. Law, 147; *Cleveland, etc. R. Co. v. Terry*, 8 Ohio St. 570; *Chicago, etc. R. Co. v. Still*, 19 Ill. 508; *Illinois, etc. R. Co. v. Ebert*, 74 Id. 399;

Thus, a deaf man should look up and down the track even more closely than might be necessary if he could hear well;² and one whose eyesight is defective ought to listen all the more carefully for trains.³ Common prudence requires that the blind should exercise far greater care, in proportion to the danger to which men, in general, are constantly exposed, than is required of those in full possession of the faculty of sight.⁴ So a lame man ought to give himself more time than others do to cross a track where trains pass frequently; he should not take a risky path;⁵ and it has been said that a cripple, or one greatly enfeebled, ought, if he can afford it, to provide himself with adequate assistance.⁶ Nevertheless, the aged, the lame and the infirm are entitled to the use of the street; more care must be exercised toward them by trainmen aware of their defects than toward those who have better powers of

Mynning v. Detroit, etc. R. Co., 59 Mich. 257; 26 N. W. 514; and other cases cited, § 88, *ante*.

² Ill. *Central R. Co. v. Buckner*, 28 Ill. 299; *Cleveland, etc. R. Co. v. Terry*, 8 Ohio St. 570. In the following cases, the injured person, being partially deaf, was held negligent, as matter of law: *State v. Baltimore, etc. R. Co.*, 69 Md. 494; 16 Atl. 210 [train behind in sight; no signals]; *Atchinson, etc. R. Co. v. Priest*, 50 Kans. 16; 31 Pac. 674 [cars "kicked" but in full view]; *Central, etc. R. Co. v. Feller*, 84 Pa. St. 226; *Artusy v. Missouri Pac. R. Co.*, 73 Tex. 191; 11 S. W. 177. In the following cases, the same rule was applied to deaf mutes: *Poole v. North Carolina R. Co.*, 8 Jones Law, 340; *Skelton v. Northwestern R. Co.*, L. R. 2 C. P. 631; *Zimmerman v. Hannibal, etc. R. Co.*, 71 Mo. 476; *Ormsbee v. Boston, etc. R. Co.*, 14 R. I. 102 [flying switch; no signal]; *Tyler v. Sites*,

88 Va. 470; 13 S. E. 978 [on ties, after warning].

³ Applied in cases where plaintiff was blind in one eye (*Marks v. Petersburg R. Co.*, 88 Va. 1; 15 S. E. 299; *McKinney v. Chicago, etc. R. Co.*, 87 Wisc. 283; 58 N. W. 386; 59 Id. 499; *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535).

⁴ *Davenport v. Ruckman*, 37 N. Y. 568; *Peach v. Utica*, 10 Hun, 477; *Oysterbank v. Gardner*, 49 N. Y. Superior 263; *Gonzales v. Harlem R. Co.*, 33 Id. 57; *Sleeper v. Sandown*, 52 N. H. 244; *Winn v. Lowell*, 1 Allen, 177.

⁵ *Delaware, etc. R. Co. v. Cadow*, 120 Pa. St. 559; 14 Atl. 450 [cripple crossed at night by unfamiliar path].

⁶ *Louisville, etc. R. Co. v. Fleming*, 14 Lea, 128. This is questionable doctrine, and certainly it is not to be universally applied (see *Neff v. Wellesley*, 148 Mass. 487; 20 N. E. 111).

motion;⁷ and they cannot be required to use more skill than they possess.⁸

§ 481a. **Children.**—The general principles, by which the contributory fault of children is to be tested, have been already stated.¹ In applying these principles, it is necessary first to distinguish carefully those cases in which children put themselves into danger, either without any notice to trainmen² or so suddenly that no reasonable degree of care will suffice to protect them from injury.³ Such accidents are very common; and no recovery can be had for them. A child being held to the use of such care as may reasonably be expected from one of his age and capacity,⁴ but to no more,⁵ the strict rules which

¹ Per Hunt, C. J., *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445. See *Illinois, etc. R. Co. v. Hutchinson*, 47 Ill. 408. Trainmen are not in fault for acting on the assumption that a trespasser will quit the track, if his deafness, and the consequent exposure to danger, were not known till after the accident (*International, etc. R. Co. v. Garcia*, 75 Tex. 583; 13 S. W. 223). The fact that a deaf mute, when killed, was walking on the track with his head and body bent forward did not indicate to the engineer that deceased was not "in possession of his faculties" (*Tyler v. Sites*, 90 Va. 539; 19 S. E. 174).

⁸ *Baltimore Traction Co. v. Wallace*, 77 Md. 435; 26 Atl. 518 [cripple not in fault for moving slowly]. The question was left to the jury in *N. Y., New Haven, etc. R. Co. v. Blessing*, 67 Fed. 277; 14 C. C. A. 394 [deaf man]; *Lortz v. N. Y. Central R. Co.*, 83 Hun, 271; second trial, 7 N. Y. App. Div. 515 [blind man].

¹ See § 73, *ante*.

² Where a small boy was standing so close to a moving car, without the knowledge of the trainmen, that the car step knocked him down and in-

jured him, the railroad company is not liable therefor (*Whitcomb v. Louisville, etc. R. Co.*, 47 La. Ann. 225; 16 So. 812). *S. P.*, *Cleveland, etc. R. Co. v. Adair*, 12 Ind. App. 569; 39 N. E. 672; 40 Id. 822 [boy seven years trespassing; no evidence that trainmen could have seen him]. A railway company is not bound to examine the cars of a train to see if any children are under them or hanging on thereto, before starting the train (*East St. Louis R. Co. v. Jenks*, 54 Ill. App. 91).

³ A boy nine years of age, while playing in the street, was run down by a horse car and killed. He did not notice the car till the driver cried to him, when he turned, and saw the horses within four feet of him. Held, that a nonsuit was proper (*North Hudson R. Co. v. Flanagan* [Ct. Errors], 57 N. J. Law, 696; 32 Atl. 216). *S. P.*, *Ogier v. Albany R. Co.*, 88 Hun, 486; 34 N. Y. Supp. 867 [electric car].

⁴ A girl fourteen years of age, who ran immediately behind a passing street car, without looking to see whether a car was approaching on the other track, was guilty of negli-

⁵ See § 73, *ante*.

are enforced against adults, in many questions of contributory fault, do not apply to him. Thus, a child is not necessarily barred from recovery because, in passing over a railroad, he fails to look and listen,⁶ or crosses directly in front of a train,⁷ or stands, sits or lies down upon the track,⁸ or dangerously near it,⁹

gence (*Thompson v. Buffalo R. Co.*, 145 N. Y. 196; 39 N. E. 709). There is no presumption that a boy between ten and fourteen years of age is not capable of exercising sufficient care to avoid injury by a railroad train in motion, whether the train be run negligently or not (*Central R., etc. Co. v. Golden*, 93 Ga. 510; 21 S. E. 68). *s. P.*, as to a colored boy, eleven years of age, possessed of ordinary intelligence and knowledge (*Payne v. Chicago, etc. R. Co.*, 129 Mo. 405; 30 S. W. 148). Where a bright, intelligent boy, eight years and seven months old, was killed by a train while walking along the track, held, that if he walked along the track in

a dangerous position, and did not use his faculties as a person of like age could, and failed to use ordinary prudence to learn if a train was approaching, when by so doing he might have avoided injury, the plaintiff could not recover unless the injury was willfully inflicted (*Cleveland, etc. R. Co. v. Tartt*, 64 Fed. 830; 12 C. C. A. 625). A boy eight years old, killed by defendant's engine while on a trestle, "if he had intelligence to appreciate and avoid the danger of the situation," cannot recover (*St. Louis, etc. R. Co. v. Christian*, 8 Tex. Civ. App. 246; 27 S. W. 932).

⁶ *Finklestein v. N. Y. Central R. Co.*, 41 Hun, 34; citing *Thurber v. Harlem, etc. R. Co.*, 60 N. Y. 326; *McGovern v. N. Y. Central R. Co.*, 67 Id. 417; *Byrne v. Same*, 83 Id. 620; *Dowling v. Same*, 90 Id. 670; *Barry v. Same*, 92 Id. 289. *s. P.*, *Mitchell v. Tacoma Railway, etc. Co.*, 13 Wash. St. 560; 43 Pac. 528.

⁷ *Collis v. N. Y. Central R. Co.*, 71 Hun, 504; 24 N. Y. Supp. 1090 [boy of nine years]; *East Tenn. Coal Co. v. Harshaw*, Ky. ; 29 S. W. 239 [no signal given].

⁸ Where plaintiff's evidence, in some fairly appreciable degree, tends to show a want of ordinary care in keeping an outlook ahead, and that a child, between four and five years old, was seated on the track, in plain view, capable of being recognized to be a child for a distance not less than twice that required to stop the train, it is error to withdraw the case from the jury

(*Gunn v. Ohio River R. Co.*, 36 W. Va., 165; 14 S. E. 463. *s. c.*, again, 37 W. Va. 421; 16 S. E. 628). But it has been held that a bright, intelligent child, seven and one-half years old, who, though he knows that trains are liable to pass, and that if, when they pass, he is on the track, he will be run over, sits down on a railroad track to play, falls asleep and is run over, is guilty of contributory negligence (*Krenzer v. Pittsburgh, etc. R. Co.*, Ind. ; 43 N. E. 649).

⁹ *Eason v. East Tennessee, etc. R. Co.*, 51 Fed. 935; 2 C. C. A. 549; 2 U.S. App. 272. The question whether a boy between twelve and thirteen years of age is guilty of contributory negligence in standing within two or three feet of the outer rail of a street-car track, is one of fact (*Ia-quinta v. Citizens' Tr. Co.*, 166 Pa. St. 63; 30 Atl. 1131).

or walks along it, without looking.¹⁰ Trainmen have no right to presume that a little child will quit the track upon hearing signals;¹¹ yet they are bound to give the usual signals, even to a child too young to comprehend them; for the parents or some other person might hear and rescue the child.¹² A railroad company is no more bound to anticipate a child's trespass than that of an adult, and it is therefore only responsible to a trespassing child, for want of ordinary care to avoid injury to him, after it is or ought to be aware of his presence.¹³ A child, straying upon a railroad track, where it crosses a street,¹⁴ or is unlawfully left unfenced,¹⁵ is not a trespasser. A child, not of sufficient age to appreciate all the dangers of a railroad, may nevertheless forfeit the right to recover, through his willful disobedience and disregard of warnings.¹⁶

¹⁰ *Illinois Cent. R. Co. v. Varnadore, Miss.* ; 15 So. 933 [boy of nine: for jury]. The fact that plaintiff consented to allow his child, for whose death he sues, to walk on the track, does not necessitate a verdict for defendant (*St. Louis, etc. R. Co. v. Christian*, 8 Tex. Civ. App. 246; 27 S. W. 932).

¹¹ *Indianapolis, etc. R. Co. v. Pitzer*, 109 Ind. 179; 6 N. E. 310; 10 Id. 70. *S. P., Spooner v. Delaware, etc. R. Co.*, 115 N. Y. 22; 21 N. E. 696.

¹² *Chicago, etc. R. Co. v. Logue*, 158 Ill. 621; 42 N. E. 53 [child twenty-one months old].

¹³ A railroad company owes no higher duty to an infant trespassing upon its tracks than to an adult, and is not liable for injuries suffered by such a trespasser, unless, after the discovery of his presence on the track, it has failed to use ordinary care to avoid injuring him (*Felton v. Aubrey*, 20 C. C. A. 436; 74 Fed. 350; *Mitchell v. Philadelphia, etc. R. Co.*, 132 Pa. St. 226; 19 Atl. 28; *McMullen v. Pennsylvania, etc. R. Co.*, 132 Pa. St. 107; 19 Atl. 27; *Baltimore, etc. R. Co. v. Schwindling*, 101 Pa. St. 258; *Flower v. Penn., etc. R. Co.*, 69 Id. 210; *Phila. etc. R. Co. v.*

Hummell, 44 Id. 375; *Thomas v. Chicago, etc. R. Co.*, 93 Iowa, 248; 61 N. W. 967. In *Morrissey v. Eastern R. Co.* (126 Mass. 377), much stronger language was used; but unnecessarily and erroneously. Where the persons operating a railroad train have no reason to suspect the presence of a boy ten years old, who is trespassing on the right of way, he can get no benefit from the fact of his tender years (*Matson v. Port Townsend R. Co.*, 9 Wash. St. 449; 31 Pac. 705). A railroad company owes no duty to a child playing in its yard, to see that he does not jump on its moving cars (*Barney v. Hannibal, etc. R. Co.*, 126 Mo. 372; 28 S. W. 1069).

¹⁴ *Tobin v. Missouri Pac. R. Co. [Mo.]*, 18 S. W. 996.

¹⁵ *Keyser v. Chicago, etc. R. Co.*, 66 Mich. 390; 33 N. W. 867.

¹⁶ Where a bright boy, who had been frequently cautioned against going on a car track where there was no public crossing, sat down under a car, and was killed by a switch engine backing against the car, the railroad company is not liable (*Atchison, etc. R. Co. v. Todd*, 54 Kans. 551; 38 Pac. 804). Plaintiff,

§ 481b. **Deceased persons.**—In the absence of any direct evidence as to whether a person, killed by accident upon a railroad, used proper care to avoid injury, the presumption is in the great majority of American courts, that the deceased did use such care.¹ But clear proof that, if he had used proper care, the accident would probably not have happened, overcomes this presumption.² Therefore, while it is presumed that he looked and listened before crossing the railroad,³ yet, if it is proved that the train by which he was killed at a railway crossing was plainly visible from the point at which it became his duty to look and listen for approaching trains before crossing the track, this overcomes the presumption that he did look and listen before crossing.⁴ Much more is this the rule, in courts which hold the burden of proof to rest upon plaintiffs, to show that they were free from contributory negligence.⁵ Even in those courts, the affirmative evidence

an active boy, eight years old, in disregard of the engineer's warning, jumped on a freight train moving up a sharp grade. Held, that the facts that the trainmen saw him hanging there, and did not stop the train, did not render the company liable for injuries received by him in jumping off (Pittsburgh, etc. R. Co. v. Redding, 140 Ind. 101; 39 N. E. 921).

¹ Where no one personally witnessed the crossing of the track by deceased, nor his death while crossing, the presumption is that he stopped, and looked and listened for approaching trains; and hence it is proper to refuse to charge that there could be no recovery if deceased, by looking and listening, could have known of the approach of the car in time to have kept off the track and prevented the accident (Texas, etc. R. Co. v. Gentry, 163 U. S. 353; 16 S. Ct. 1104).

² *Connerton v. Delaware, etc. Canal Co.*, 169 Pa. St. 339; 32 Atl. 416; *Tobias v. Michigan Cent. R. Co.*, 103 Mich. 330; 61 N. W. 514.

³ In the absence of evidence to the

contrary, it will be presumed that a person about to cross a railroad track both looked and listened for an approaching train before venturing on the crossing [*Chicago, etc. R. Co. v. Hinds*, 56 Kans. 758; 44 Pac. 993]. In other cases, held, a question for the jury (*Huntress v. Boston, etc. R.*, 66 N. H. 185; 34 Atl. 154; *Weller v. Chicago, etc. R. Co.*, 120 Mo. 635; 23 S. W. 1061; 25 Id. 532; *Gammage v. Atlanta, etc. R. Co.*, 97 Ga. 62; 25 S. E. 207).

⁴ *Sullivan v. N. Y., Lake Erie, etc. R. Co.*, 175 Pa. St. 361; 34 Atl. 798; *Hogan v. Tyler*, 90 Va. 19; 17 S. E. 723; *Blount v. Grand Trunk R. Co.*, 61 Fed. 375; 9 C. C. A. 526. The fact that others heard signals is not conclusive proof that the deceased did so (*Chicago, etc. R. Co. v. Netolicky*, 14 C. C. A. 615; 67 Fed. 665).

⁵ In many cases it has been held that clear proof that a person killed by a train could have seen it, if he had looked and listened, is conclusive of his negligence (*Tucker v. N. Y. Central R. Co.*, 124 N. Y. 308; 26 N. E. 916; *Tolman v. Syracuse, etc. R. Co.*, 98 N. Y. 198; *Smith v.*

of the use of care by deceased persons is not required to be as strong as where the injured person is living and able to testify.⁶

§ 482. **Effect of contributory negligence on statutory liabilities.**—Statutes giving a right of action to persons injured through the neglect of a railroad company to limit speed or make signals at special places do not usually confer a right of action which cannot be defeated by contributory negligence.¹ The defendant's omission to give the signals² or

Minneapolis, etc. R. Co., 26 Minn. 419; Chicago, etc. R. Co. v. Hedges, 118 Ind. 5; 20 N. E. 530; Cones v. Cincinnati, etc. R. Co., 114 Ind. 328; 16 N. E. 638; Kwiotkowski v. Grand Trunk R. Co., 70 Mich. 549; 38 N. W. 463; Groesbeck v. Chicago, etc. R. Co., 93 Wisc. 505; 67 N. W. 1120; Studley v. St. Paul, etc. R. Co., 48 Minn. 249; 51 N. W. 115; Moore v. Keokuk, etc. R. Co., 89 Iowa, 223; 56 N. W. 430).

⁶ When there are no living witnesses, and it is shown that the intestate was familiar with the crossing, and was of a careful habit, the jury are justified in finding that he was in the exercise of due care (McNulta v. Lockridge, 137 Ill. 270; 27 N. E. 452). A plaintiff administrator is not required in all cases to prove affirmatively that his intestate, who has been killed at a railroad crossing, looked or listened for approaching trains (Hendrickson v. Great Northern R. Co., 49 Minn. 245; 51 N. W. 1044). *s. p.*, Evans v. Concord R. Co., 66 N. H. 194; 21 Atl. 105; McNamara v. N. Y. Central R. Co., 136 N. Y. 650; 32 N. E. 765 [trainmen clearly negligent: smoke probably obstructed view]; Palmer v. N. Y. Central R. Co., 112 N. Y. 234; 19 N. E. 678 [gates open: no signals in time; doubtful view]; Tobias v. Mich. Central R. Co., 103 Mich. 330; 68 N. W. 234 [electric bell not work-

ing]; and see *Nettersheim v. Chicago, etc. R. Co.*, 58 Minn. 10; 59 N. W. 632; and cases cited under § 111, *ante*). Extreme short-sight may excuse full care (*Lortz v. N. Y. Central R. Co.*, 7 N. Y. App. Div. 515; 40 N. Y. Supp. 253).

¹ See cases cited under § 62, *ante*, and under next two notes; also *Wilcox v. Rome, etc. R. Co.*, 39 N. Y. 358; *Cincinnati, etc. R. Co. v. Butler*, 103 Ind. 31; 2 N. E. 138; *Galena, etc. R. Co. v. Loomis*, 13 Ill. 548; *Ohio, etc. R. Co. v. Eaves*, 42 Id. 288; *Williams v. Chicago, etc. R. Co.*, 64 Wisc. 1; 24 N. W. 422. Many cases of this kind will be found under § 476, *ante*.

² *Chicago, etc. R. Co. v. Houston*, 95 U. S. 697; *Havens v. Erie R. Co.*, 41 N. Y. 296; *Gorton v. Erie R. Co.*, 45 Id. 660; *Cullen v. Delaware, etc. Canal Co.*, 113 N. Y. 667; 21 N. E. 716; *Sherry v. N. Y. Central R. Co.*, 104 N. Y. 652; 10 N. E. 128; *Ormsbee v. Boston, etc. R. Co.*, 14 R. I. 102; *Barber v. Richmond, etc. R. Co.*, 34 S. C. 444; 13 S. E. 630; *Butcher v. West Virginia, etc. R. Co.*, 37 W. Va. 180; 16 S. E. 457; *Beyel v. Newport News, etc. R. Co.*, 34 W. Va. 538; 12 S. E. 532; *Wabash, etc. R. Co. v. Wallace*, 110 Ill. 114; *Miller v. Terre Haute, etc. R. Co.*, 144 Ind. 323; 43 N. E. 257; *Louisville, etc. R. Co. v. Stommel*, 126 Ind. 35; 25 N. E. 863; *Wil-*

keep within the speed³ prescribed by law is no excuse for the plaintiff's omission to look and listen. The statute of Tennessee is an exception to this rule, because of its peculiar language.⁴ On the other hand, travelers have a right to assume that railroad companies will obey the statutes and ordinances which regulate their action.⁵ They may rely, to a reasonable extent, upon the fact that the statutory signals are not given, as indicating that no train is near,⁶ and it is not

liams v. Chicago, etc. R. Co., 64 Wisc. 1; 24 N. W. 422; Judson v. Great Northern R. Co., 63 Minn. 248; 65 N. W. 447; Sala v. Chicago, etc. R. Co., 85 Iowa, 678; 52 N. W. 664; Dlauhi v. St. Louis, etc. R. Co., 105 Mo. 645; 16 S. W. 281; Maxey v. Missouri Pac. R. Co., 113 Mo. 1; 20 S. W. 654; Atchison, etc. R. Co. v. Townsend, 39 Kans. 115; 17 Pac. 804; Blackwell v. St. Louis, etc. R. Co., 47 La. Ann. 268; 16 So. 818; McDonald v. International, etc. R. Co., 86 Tex. 1; 22 S. W. 939; Glascock v. Central Pac. R. Co., 73 Cal. 137; 14 Pac. 518; Hager v. Southern Pac. Co., 98 Cal. 309; 33 Pac. 119; Ryall v. Central Pac. R. Co., 76 Cal. 474; 18 Pac. 430; Griffith v. Baltimore, etc. R. Co., 44 Fed. 574; Horn v. Baltimore, etc. R. Co., 4 C. C. A. 346; 54 Fed. 301 [Ohio statute]; Saldana v. Galveston, etc. R. Co., 43 Fed. 862 [Texas statute].

³Blanchard v. Lake Shore, etc. R. Co., 126 Ill. 416; 18 N. E. 799; Korradly v. Lake Shore, etc. R. Co., 131 Ind. 261; 29 N. E. 1069; Pennsylvania Co. v. Meyers, 136 Ind. 242; 36 N. E. 32; Nosler v. Chicago, etc. R. Co., 73 Iowa, 268; 34 N. W. 850; Gresham v. Louisville, etc. R. Co. [Ky.], 24 S. W. 869; Studley v. St. Paul, etc. R. Co., 48 Minn. 249; 51 N. W. 115; Strong v. Canton, etc. R. Co. [Miss.], 3 So. 465. A boy eleven years of age, who, after crossing a railroad track, turns back so near a

train passing over the crossing as to be struck, is guilty of negligence which will preclude recovery, though defendant was also negligent in running its cars at an unlawful rate of speed (Payne v. Chicago, etc. R. Co., 129 Mo. 405; 81 S. W. 885). s. p. Prewitt v. Eddy, 115 Mo. 283; 21 S. W. 742.

⁴Under Tennessee statutes (Code, § 1166), contributory negligence is no bar, but goes only in mitigation of damages (Chesapeake, etc. R. Co. v. Foster, 88 Tenn. 671; 13 S. W. 696; s. c., again, 14 Id. 428; Knoxville, etc. R. Co. v. Acuff, 92 Tenn. 26; 20 S. W. 348).

⁵Johanson v. Boston, etc. R. Co., 153 Mass. 57; 26 N. E. 426 [flagman gave no signal to children killed].

⁶Evansville, etc. R. Co. v. Marohn, 6 Ind. App. 646; 34 N. E. 27. The conduct of a person in attempting to cross a railroad track must be judged by the surrounding circumstances, and the facts that it was a public street where a flagman was ordinarily present, where trains would not be operated at usual speed, and proper signals would be given, may all be relied upon, and must be considered in determining the question of contributory negligence (McNamara v. N. Y. Central R. Co., 136 N. Y., 650; 32 N. E. 765; Omaha, etc. R. Co. v. O'Donnell, 22 Neb. 475; 35 N. W. 235; St. Louis, etc. R. Co. v. Amos, 54 Ark. 159; 15 S. W. 362). Failure to give the usual

contributory negligence for them to act upon the assumption that trains will, in running through a city, conform to a city ordinance as to speed,⁷ so long as they have not clear notice to the contrary.⁸

§ 483. Duty to avoid effects of contributory negligence.—

The rule stated in section 99, that the plaintiff may recover, notwithstanding his contributory negligence, if the defendant, after becoming chargeable with notice of the plaintiff's danger, failed to use ordinary care to avoid injuring him, has been enforced in many railroad cases.¹ It is universally agreed that this rule applies to all cases in which the defendant or his agent is actually aware of the plaintiff's danger. Thus, a locomotive engineer or motorman, after becoming aware of the presence of any person on,² or dangerously near the track,³ however imprudently or wrongfully,⁴ is bound to use as much

whistle on approaching a crossing relieves the plaintiff from the imputation of contributory negligence, if, by reason thereof, she was misled into exposing herself to danger, and induced to cross the track, believing it safe, without stopping to look and listen (*Russell v. Carolina Cent. R. Co.*, 118 N. C. 1098; 24 S. E. 512). To somewhat similar effect, *Hendrickson v. Great Northern R. Co.*, 49 Minn. 245; 51 N. W. 1044.

¹ *Kellny v. Missouri Pac. R. Co.*, 101 Mo. 67; 13 S. W. 806 [traveler need not look backward, when no signal sounded]; *Louisville, etc. R. Co. v. Webb*, 97 Ala. 308; 12 So. 374; [unlawful speed and no signals; held, gross negligence, superseding plaintiff's negligence].

⁸ *Sullivan v. Missouri Pac. R. Co.*, 117 Mo. 214; 23 S. W. 149; *Piper v. Chicago, etc. R. Co.*, 77 Wisc. 247; 46 N. W. 165; *Pittsburgh, etc. R. Co. v. Bennett*, 9 Ind. App. 92; 35 N. E. 1033; *Hart v. Devereux*, 41 Ohio St. 565. See *Meek v. Penn. Co.*, 38 Id. 632; and cases cited under § 92, *ante*.

¹ See cases cited under § 99, *ante*; also *Chicago, etc. R. Co. v. Cauffman*, 38 Ill. 424; *Needham v. San Francisco, etc. R. Co.*, 37 Cal. 409; *East Tennessee, etc. R. Co. v. Fain*, 12 Lea, 35; *Kansas Pacific R. Co. v. Cranmer*, 4 Colo. 524; *Frazer v. South, etc. Ala. R. Co.*, 81 Ala. 185; *Clampit v. Chicago, etc. R. Co.*, 84 Iowa, 71; 50 N. W. 673; *Norwood v. Raleigh, etc. R. Co.*, 111 N. C. 236; 16 S. E. 4. Where defendant neither knew nor was bound to know of plaintiff's peril, the rule does not apply (*Tyler v. Kelley*, 89 Va. 282; 15 S. E. 509 [backing train: epileptic trespassing]).

² *Hooker v. Chicago, etc. R. Co.*, 76 Wisc. 542; 44 N. W. 1085 [train not checked in time]; *Orr v. Cedar Rapids, etc. R. Co.*, 94 Iowa, 62; 62 N. W. 851; *Tobin v. Missouri Pac. R. Co. [Mo.]*, 18 S. W. 996; *Highland Ave. etc. R. Co. v. Sampson*, 91 Ala. 560; 8 So. 778.

³ *Esrey v. Southern Pac. R. Co.*, 103 Cal. 541; 37 Pac. 500.

⁴ Recovery may be had for the death of a trespasser, killed while

care to avoid injury to him as he ought to use in favor of one lawfully and properly upon the track,⁵ that is to say, ordinary care with respect to anticipating injury, before it becomes imminent,⁶ and the utmost care and diligence of which he is personally capable, after he knows that it is imminent.⁷ He must promptly use all the usual signals to warn the trespasser of danger,⁸ and he must also check the speed of his train,⁹ and even bring it to a full stop, if necessary,¹⁰ unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train and will step off the track in ample time to avoid all danger, without any

sitting on a railroad track, though he was guilty of contributory negligence, if those in charge of the train could, after discovering his peril, by proper care and due diligence, have avoided the accident (*Seaboard, etc. R. Co. v. Joyner*, 92 Va. 354; 23 S. E. 773; and see cases cited in note 13).

⁵ After discovery of a trespasser's peril, those in charge of a train are to use the same care to avoid injuring him as in case of one rightfully on the track (*Seaboard, etc. R. Co. v. Joyner*, 92 Va. 354; 23 S. E. 733).

⁶ Cases cited under §§ 99, 100, *ante*.

⁷ *Omaha, etc. R. Co. v. Cook*, 42 Neb. 577; 60 N. W. 899 [obligation to use all possible means consistent with the safety of his train to avoid injuring plaintiff]; *Wallace v. Suburban R. Co.*, 26 Oreg. 174; 37 Pac. 477 [duty to exercise all the diligence then possible to avoid injuring]; *Saldana v. Galveston, etc. R. Co.*, 43 Fed. 862 [all means in their power].

⁸ *Fiedler v. St. Louis, etc. R. Co.*, 107 Mo. 645; 18 S. W. 847 [signals not made promptly]; *Newport News, etc. R. Co. v. Deuser*, 97 Ky. 92; 29 S. W. 973 [signals not given promptly]; *White v. N. Y. Central R. Co.*, 65 Hun, 621; 20 N. Y. Supp. 6 [no signal: train not checked].

⁹ *Reardon v. Missouri Pac. R. Co.*, 114 Mo. 384; 21 S. W. 731 [speed not

checked]; *Chicago, etc. R. Co. v. Triplett*, 38 Ill. 482; *Meyer v. Midland, etc. R. Co.*, 2 Neb. 319. So, where a wagon stuck in the rails, the engineer had no right to assume that it would be taken off the track before he reached it, but was bound to stop the train (*Chicago, etc. R. Co. v. Hogarth*, 38 Ill. 370).

¹⁰ No matter how much in fault he may be, yet if trespasser refuses to quit track, engineer is bound to stop train entirely (*Bouwmeester v. Grand Rapids R. Co.*, 63 Mich. 557; 30 N. W. 337; *Spooner v. Delaware, etc. R. Co.*, 115 N. Y. 22; 21 N. E. 696; *Sutzin v. Chicago, etc. R. Co.*, 95 Iowa, 304; 63 N. W. 709; *Erickson v. St. Paul, etc. R. Co.*, 41 Minn. 500; 43 N. W. 332; *Union Pac. R. Co. v. Mertes*, 35 Neb. 204; 52 N. W. 1099; *Knoxville, etc. R. Co. v. Acuff*, 92 Tenn. 26; 20 S. W. 348 [statutory rule]). If those in charge of a train see that an accident has happened to a traveler at such crossing, they should use reasonable efforts to stop the train in season to avoid a collision (*Purinton v. Maine Cent. R. Co.*, 78 Me. 569; 7 Atl. 707). An engineer is not willfully negligent in failing to stop to examine an object which he supposes to be a dog, lying on the track, but which, on closer approach, is discerned to be a child, but is only so negligent in case he might have

diminution of the speed of the train.¹¹ These rules apply to all cases, even of the most outrageous negligence on the part of a person on the track, as, for example, where a person

stopped after the child had been discerned as such (Louisville, etc. R. Co. v. Williams, 69 Miss. 631; 12 So. 957).

¹¹ The engineer has the right to presume that an adult person upon or beside the track ahead is in possession of his faculties, and that he will get off the track if already on it, or not get on it if already off; hence it is not negligence on the engineer's part to fail to attempt to stop his engine (after giving proper signals), unless he knows that the party labors under some disability that prevents him from knowing of his danger, or from getting or keeping out of the way, or unless he sees evidences of such disability from the party's actions or appearance, or knows that he cannot or will not get or keep out of the way (Florida, etc. R. Co. v. Williams, 37 Fla. 406; 20 So. 558). This is an excellent statement of the rule. *s. P.*, Norwood v. Raleigh, etc. R. Co., 111 N. C. 236; 16 S. E. 4; High v. Carolina Cent. R. Co., 112 N. C. 385; 17 S. E. 79; Syne v. Richmond, etc. R. Co., 113 N. C. 558; 18 S. E. 114; Meredith v. Richmond, etc. R. Co., 108 N. C. 616; 13 S. E. 137 [boy of thirteen]; Houston, etc. R. Co. v. Smith, 52 Tex. 178 [whistle sounded: road by side of track]; St. Louis, etc. R. Co. v. Herrin, 6 Tex. Civ. App. 718; 26 S. W. 425; Indianapolis, etc. R. Co. v. McClaren, 62 Ind. 566 [man of middle age, in possession of sight and hearing, overtaken by an engine moving three miles an hour, with bell ringing]; Pennsylvania Co. v. Meyers, 136 Ind. 242; 36 N. E. 32; Ohio, etc. R. Co. v. Walker, 113 Ind. 196; 15 N. E. 234; Omaha, etc. R.

Co. v. Cook, 42 Neb. 905; 62 N. W. 235; Holmes v. South Pac. Coast R. Co., 97 Cal. 161; 31 Pac. 834; White v. N. Y. Central R. Co., 65 Hun, 621; 20 N. Y. Supp. 6. See also Frech v. Philadelphia, etc. R. Co., 39 Md. 574; St. Louis, etc. R. Co. v. Monday, 49 Ark. 257; 4 S. W. 782; June v. Boston, etc. R. Co., 153 Mass. 79; 26 N. E. 238 [signals given: but speed unchecked: no recovery]. If the engineer, on the reasonable belief that plaintiff was safe, released the brakes, when, but for such belief he would have stopped the train, the plaintiff could not recover (Little v. Carolina Cent. R. Co., 118 N. C. 1073; 24 S. E. 514). Where one is walking on a footpath, close to a railroad track, in the daytime, the engineer of a train going in the same direction may reasonably assume that such person will either stay there, or step further from the track, when he sees the train (Matthews v. Atlantic, etc. R. Co., 117 N. C. 640; 23 S. E. 177). Where a rapidly moving train is in plain sight of a crossing, the engineer is justified in thinking that a person on the path about twelve feet from and approaching the track, as if intending to cross, will not attempt to cross in front of the train (Birmingham R. Co. v. Bowers, 110 Ala. 328; 20 So. 345). But where an engineer in violation of law failed to check the speed of his train in approaching a public crossing, Held that he had no right to assume, on seeing a man on the track, that he would get off in time to save himself (Georgia R. Co. v. Daniel, 89 Ga. 463; 15 S. E. 538).

attempts to cross in the very front of a train;¹² or where children or drunkards have actually fallen asleep lying across the rails. If the engineer becomes aware of anything lying upon or dangerously near the track, which may possibly be a human being or a valuable animal, he is bound to check the speed of his train, so as to enable him to stop in time to avoid injury; and if injury ensues from his neglect to do this, his sincere belief that the object was worthless is no defense.¹³ In general, an engineer has the right to assume that a person walking upon the track is free to act, and is in possession of all ordinary faculties, and will therefore act with ordinary prudence;¹⁴ but when the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution, and to check or even stop the train, as may be necessary.¹⁵ So, where he sees a little child upon the track, he has no right to assume that the child will use the same discretion for its own protection as an older person would; and he must bring the speed of the train under control as quickly as possible, so as to be able to stop it altogether, if the child does not appreciate its

¹² Chicago, etc. R. C. v. Prouty, 55 Kans. 503; 40 Pac. 909 [frightened horses running upon track]; State v. Baltimore, etc. R. Co., 69 Md. 339; 14 Atl. 685 [crossing twenty feet in front of train].

¹³ East Tennessee, etc. R. Co. v. St. John, 5 Sneed, 524 [negro boy asleep on track; engineer mistook him for an old coat]; Keyser v. Chicago, etc. R. Co., 66 Mich. 390; 33 N. W. 867 [engineer mistook plaintiff for a pig on track]; Meeks v. Southern Pac. R. Co., 56 Cal. 513 [engineer supposed child on track was a bunch of leaves or weeds, until too late to stop]. See also Burnett v. Burlington, etc. R. Co., 16 Neb. 332; Frick v. St. Louis, etc. R. Co., 5 Mo. App. 435; Houston, etc. R. Co. v. Sympkins, 54 Tex. 615 [plaintiff fell in a pit on track].

¹⁴ When an engineer sees an adult person walking on the track in front of the train, who appears to have the use of his senses, and not to be under

any physical disability, he may presume that the trespasser will heed the warnings given, and step from the track in time to avoid injury (Campbell v. Kansas City, etc. R. Co., 55 Kans. 536; 40 Pac. 997; Candee v. Kansas City, etc. R. Co., 130 Mo. 143; 31 S. W. 1029; Louisville, etc. R. Co. v. Black, 89 Ala. 313; 8 So. 246 [deaf mute: signals sounded; no notice of his infirmity]; Nichols v. Louisville, etc. R. Co. [Ky.], 6 S. W. 339 [deaf mute]; Daily v. Richmond, etc. R. Co., 106 N. C. 301; 11 S. E. 320 [idiot]; and other cases cited in note 9 and elsewhere).

¹⁵ So held where the traveler evidently was under difficulties (Spooner v. Delaware, etc. R. Co., 115 N. Y. 23; 21 N. E. 696); or was evidently trying to get off the track, without success (Texas, etc. R. Co. v. Roberts, 2 Tex. Civ. App. 111; 20 S. W. 960); or was evidently so drunk as to be unable to take care of himself (Central R. Co. v. Glass, 60 Ga. 441).

danger.¹⁶ If a child suddenly dashes upon the track, giving the engineer no time to stop the train before a collision occurs, the engineer is no more in fault than he would be in the case of an adult. It is a case of inevitable accident, not of contributory negligence.¹⁷ If the injury is finally caused by negligence of the plaintiff, later in order of causation than any negligence of the defendant, the plaintiff cannot recover.¹⁸ Where trainmen have done all in their power to avoid injury,

¹⁶*International, etc. R. Co. v. Smith*, 62 Tex. 252; *Schwieger v. N. Y. Central R. Co.*, 90 N. Y. 558; *Isabel v. Hannibal, etc. R. Co.*, 60 Mo. 475; *Farris v. Cass Ave. R. Co.*, 18 Mo. 325 [driver of street car saw child playing within six feet of track; kept horses on a trot until within seven feet of child; question for jury]. See § 481, *ante*; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473; 3 S. W. 705 [company should exercise the highest degree of diligence towards a child of tender years]. Jury may hold that car should be stopped for child on track (*Louisville, etc. R. Co. v. Lohges*, 6 Ind. App. 288; 33 N. E. 449; *Mason v. Minneapolis R. Co.*, 54 Minn. 216; 55 N. W. 1122). There is a decision directly opposed to this doctrine (*Singleton v. Eastern Counties R. Co.*, 7 C. B. N. S. 287), where the plaintiff, a child three and a half years old, had strayed upon the track, and the engineer, though he blew the whistle, made no effort to stop the train, and the plaintiff's leg was cut off; yet the plaintiff was nonsuited. But we entertain no doubt that this decision was wrong, and that the opinion of *Agnew, J.*, in *Phila. & Reading R. Co. v. Spearen* (47 Pa. St. 300), in which he said that it was the duty of an engineer to stop his train altogether, on seeing a little child upon the track, although it would not be his duty to do so in the case of an adult, was correct. Of course we

agree that if the engineer, in the exercise of sound judgment and great care, has every reason to believe that a child will escape, he is not bound absolutely to stop the train (*Meyer v. Midland, etc. R. Co.*, 2 Neb. 319), but that is a very different thing from saying that he is not bound to bring the train under control. See *Payne v. Humeston, etc. R. Co.*, 70 Iowa, 584; 31 N. W. 886. Where the engineer saw children ahead, in a dangerous position, on a railway bridge having two tracks, knew that another train was close behind on the other track, and that the place to stand on the bridge between the two tracks was less than three feet, having a plank walk one foot wide, — the jury is justified in finding him negligent for not stopping his train, when he could have done so, although he thought the children would go on the plank walk (*Sutzin v. Chicago, etc. R. Co.*, 95 Iowa, 304; 63 N. W. 709).

¹⁷*Phila. & Reading R. Co. v. Spearen*, 47 Pa. St. 300; *Dorman v. Broadway R. Co.*, 117 N. Y. 655; 23 N. E. 162; *Baker v. Eighth Ave. R. Co.*, 62 Hun, 39; 16 N. Y. Supp. 319; *Benson v. Central Pac. R. Co.*, 98 Cal. 45; 32 Pac. 809; *Id.* 33 Pac. 206 [child, six years old, becoming frightened, broke away from her father and went in front of train].

¹⁸*Remer v. Long Island R. Co.*, 48 Hun, 352.

after becoming chargeable with notice of the necessity, the company is not liable.¹⁹

§ 484. Duty to anticipate contributory negligence.—

The rule stated in the last section, however, does not cover the whole ground. The defendant is responsible, not only for what he actually knows, but for that which he is bound to know. It is clear that the frequent statements that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been "reckless," "willful" or "wanton,"¹ or even grossly negligent,² are not sound. No courts have in actual practice adhered to this imaginary rule: it has been explicitly overruled,³ and, indeed, it has been explained

¹⁹ *Garland v. Maine Cent. R. Co.*, 85 Me. 519; 27 Atl. 615; *Chaffee v. Old Colony R. Co.*, 17 R. I. 658; 35 Atl. 47; *Vreeland v. Chicago, etc. R. Co.*, 92 Iowa, 279; 60 N. W. 542; *Norfolk, etc. R. Co. v. Harman*, 83 Va. 553; 8 S. E. 251; *Byrne v. Kansas City, etc. R. Co.*, 9 C. C. A. 666; 61 Fed. 605.

¹ A railroad company is not liable for injury to a trespasser upon its tracks unless its agents are guilty of willful wrong or wanton negligence (*Verner v. Alabama, etc. R. Co.*, 103 Ala. 574; 15 So. 872; *Louisville, etc. R. Co. v. Williams*, 69 Miss. 631; 12 So. 957). The injury in such case must be "willful" (*Gregory v. Cleveland, etc. R. Co.*, 112 Ind. 385; 14 N. E. 228; *Tyler v. Sites*, 88 Va. 470; 13 S. E. 978); or willful or reckless (*Little Rock, etc. R. Co. v. Haynes*, 47 Ark. 497; 1 S. W. 774). A railroad company owes no duty to one who has gone into its switching yard for purposes of curiosity merely, in violation of its rules, except to refrain from wanton or reckless injury to such person (*Kansas City etc. R. Co., v. Cook*, 66 Fed. 115; 13 C. C. A. 364; *Dooley v. Mobile, etc. R. Co.*, 69 Miss. 648; 12 So. 956). And the same ruling has been made as to persons on railroad tracks by bare license or implied

permission (*Cleveland, etc. R. Co. v. Adair*, 12 Ind. App. 569; 40 N. E. 822 [injury must be willful]; *Cleveland, etc. R. Co. v. Stephenson*, 139 Ind. 641; 37 N. E. 720 [licensee or trespasser]; *Settoon v. Texas, etc. R. Co.*, 48 La. Ann. 807; 19 So. 759 [wantonness or malice necessary]). For the death of a mere licensee, no recovery can be had unless it was caused willfully, or by negligence so gross as to imply willfulness (*Cleveland, etc. R. Co. v. Tartt*, 64 Fed. 823; 12 C. C. A. 618).

² A railroad company is liable to a trespasser only for gross negligence (*Eastern Kentucky R. Co. v. Powell, Ky.* ; 33 S. W. 629), or wanton or gross negligence (*Spicer v. Chesapeake, etc. R. Co.*, 34 W. Va. 514; 12 S. E. 553), or gross negligence amounting to malice (*Schexnaydre v. Texas, etc. R. Co.*, 46 La. Ann. 248; 14 So. 513 [deaf mute on track]), or such gross negligence and recklessness as was equivalent to willfulness (*Rome R. Co. v. Barnett*, 89 Ga. 718; 15 S. E. 639.)

³ It certainly need not be willful, malicious or "regardless of consequences" (*Christian v. Ill. Central R. Co.*, 71 Miss. 237; 15 So. 71; overruling the *dicta* cited in note 1). Even if plaintiff was a trespasser

away or disavowed by courts which had previously stated it. Nothing more is really meant by the courts using these phrases than a want of ordinary care, after becoming actually aware of the plaintiff's peril.⁴ But it is much better to say so. The more frequent declaration, that the defendant is not liable, unless he actually sees or knows the plaintiff's peril,⁵

on defendant's track, defendant was not relieved from liability, if he was injured by reason of its culpable ignorance of his dangerous situation, or negligence in any other particular (*Mitchell v. Boston, etc. R. Co.*, N. H. ; 34 Atl. 674). It is not necessary that defendant's negligence should be gross, wanton or willful (*Id.*; *Felch v. Concord R. Co.*, 66 N. H. 318; 29 Atl. 557). Where the injured person, though negligent, was not a trespasser, held, that if the act which caused the injury was committed by the defendant after it discovered his negligence, and when, in the exercise of reasonable care, it could have avoided the injury, the negligence of the defendant in such case, to warrant a recovery, need not be gross (*Valin v. Milwaukee, etc. R. Co.*, 82 Wisc. 1; 51 N. W. 1084).

⁴ Failure to check speed, after actual knowledge of plaintiff's peril, was held to be "reckless and wanton," or "willful" or "gross negligence," in *Central R. Co. v. Vaughan*, 93 Ala. 209; 9 So. 468 ["reckless and wanton"]; *Glass v. Memphis, etc. R. Co.*, 94 Ala. 581; 10 So. 215 [same]; *Central R. etc. Co. v. Denson*, 84 Ga. 774; 11 S. E. 1039 ["wanton and willful"]. So, also, where the engineer could have seen a trespasser on the track (*Lake Shore, etc. R. Co. v. Bodemer*, 139 Ill. 596; 29 N. E. 692). Plaintiff negligently went near defendant's track, and, after being struck by one car, threw herself on the ground to save herself from

further injury. A brakeman, who saw her, gave the engineer an additional signal to proceed, which he did. Held, that the trainman's wantonness was a question for the jury (*Esrey v. Southern Pac. Co.*, 103 Cal. 541; 37 Pac. 500). Though plaintiff was negligent, the motor-man was guilty of such "reckless disregard of the consequences to" plaintiff as to make the company liable (*Montgomery v. Lansing Electric R. Co.*, 103 Mich. 46; 61 N. W. 543). The engineer made no effort to check the speed of the train until he was within 40 feet of deceased. Held, that the facts authorized the jury to find that the killing was willful, though the engineer denied that he intended to kill the man, or run over him (*Lake Erie, etc. R. Co. v. Brafford*, 15 Ind. App. 655; 43 N. E. 883).

⁵ The fact that persons have been in the habit of using a railroad track for a foot-path does not make the defendant liable for injuries to such persons by running over them, if the engineer did not in fact see them, whether he had or had not reason to suppose that some person might be using the track as a path (*Wabash R. Co. v. Jones*, 163 Ill. 167; 45 N. E. 50, *Magruder, C. J.*, dissenting). The liability of a railroad company to a trespasser on its track must be measured by the conduct of its employees after they become aware of his presence there, and not by their negligence in failing to discover him; for, as to such negligence, the contributory negligence of the tres-

are, however, equally erroneous, as too broad statements of abstract law,⁶ however proper they may have been with reference to the particular case under consideration. The rule that a plaintiff is, as matter of law, negligent, if he fails to see what he was bound to look for and ought to have seen, is rigidly enforced;⁷ and the same rule must, in common justice, be applied to the defendant. And, in fact, it actually is, in almost every court where the question is squarely presented.⁸

passer will defeat a recovery (St. Louis, etc. R. Co. v. Monday, 49 Ark. 257; 4 S. W. 782). To the same effect, *Montgomery v. Alabama*, G. S. R. Co., 97 Ala. 305; 12 So. 170; *Galveston, etc. R. Co. v. Ryon*, 70 Tex. 56; 7 S. W. 687; *Gherkins v. Louisville, etc. R. Co.*, Ky. ; 30 S. W. 651; *Studley v. St. Paul*, etc. R. Co., 48 Minn. 249; 51 N. W. 115. See *Western Maryland R. Co. v. Kehoe*, 83 Md. 434; 35 Atl. 90; *Green v. Louisville, etc. R. Co.* [Miss.], 12 So. 826. Otherwise in Arkansas now, by statute April 8, 1891 (St. Louis, etc. R. Co. v. Dingman, 62 Ark. 245; 35 S. W. 219). A railroad company is not required to keep a lookout for trespassers on its tracks, and is not liable for injuries to one struck by a train, unless he was actually seen within time to avoid the accident (*Thomas v. Chicago*, etc. R. Co., 23 Iowa, 248; 61 N. W. 967; *Baker v. Chicago*, etc. R. Co., 95 Iowa, 163; 63 N. W. 667; *Scheffier v. Minneapolis*, etc. R. Co., 32 Minn. 518; *Central R. Co. v. Vaughan*, 93 Ala. 209; 9 So. 468; *Kirtley v. Chicago*, etc. R. Co. [C. C.], 65 Fed. 386).

⁶ See this subject discussed in § 99, *ante*, and cases cited below, in note 8.

⁷ See § 476, *ante*.

⁸ *Felch v. Concord R. Co.*, 66 N. H. 318; 29 Atl. 557 [“could have seen”]; *Lloyd v. St. Louis*, etc. R. Co., 128 Mo. 595; 29 S. W. 153; 31

Id. 110 [by ordinary care could have seen]; *Chamberlain v. Missouri Pac. R. Co.*, 133 Mo. 587; 33 S. W. 437 [same]; *Louisville, etc. R. Co. v. Krey*, Ky. ; 29 S. W. 869; *Deans v. Wilmington, etc. R. Co.*, 107 N. C. 686; 12 S. E. 77 [same: man lying on track]; *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87; 19 S. W. 1134; 21 *Id.* 1110 [must use due care to see]; *Guenther v. St. Louis*, etc. R. Co., 95 Mo. 286; 8 S. W. 371 [“might have become aware”]; *Guenther v. St. Louis*, etc. R. Co., 108 Mo. 18; 18 S. W. 846 [could have become aware]; *Dahlstrom v. St. Louis*, etc. R. Co., 96 Mo. 99; 8 S. W. 777 [“should have discovered”]; *Cahill v. Cincinnati, etc. R. Co.*, 92 Ky. 345; 18 S. W. 2 [same]; *Nave v. Alabama*, etc. R. Co., 96 Ala. 264; 11 So. 391 [high speed and no lookout, where persons are likely to be on track]. The running of a train through depot-grounds, thronged with people, at a rate of speed prohibited by an ordinance, renders one company liable to persons injured, though such persons failed to exercise ordinary care (*Chicago*, *Burlington*, etc. R. Co. v. *Johnson*, 53 Ill. App. 478). A railroad company must use reasonable care to discover persons walking on its tracks (*Texas*, etc. R. Co. v. *Watkins*, 88 Tex. 20; 29 S. W. 232). So held, in favor of children (*Bot-toms v. Seaboard*, etc. R. Co., 114 N. C. 699; 19 S. E. 730; *Chicago*,

Trainmen may justly assume that travelers will comply with the law, in accordance with the general rule upon that point:⁹ but if observation has convinced them that, at certain times and places, this assumption is not borne out by the facts, they are not justified in acting upon it.¹⁰ Therefore, while trainmen are not usually bound to foresee or watch for the wrongful presence of any person upon the track,¹¹ even where it is open to an adjoining highway;¹² nor to foresee the wrongful entry of persons upon the cars,¹³ yet, if experience has shown that at certain points persons are constantly thus entering upon the track or the cars,¹⁴ such persons, if injured as the proxi-

etc. R. Co. v. Grablin, 38 Neb. 90; 56 N. W. 796). Evidence that deceased could have been seen in time to avoid the accident, and that the engineer was probably asleep, is sufficient to sustain a verdict of negligence (Craft v. Northern Pac. R. Co., 62 Fed. 735).

⁹ For the general rule on this point, see § 92, *ante*.

¹⁰ See § 92, *ante*; Chicago, etc. R. Co. v. Wymore, 40 Neb. 645; 58 N. W. 1120. This rule was clearly and concisely stated by Woodruff, J., in Grippen v. N. Y. Central R. Co., 40 N. Y. 34.

¹¹ See cases cited in note 5; also Western Maryland R. Co. v. Kehoe, 83 Md. 484; 35 Atl. 90 [man lying ten feet from crossing]. The mere failure to keep a lookout for trespassers on a railroad track, elsewhere than at a public crossing or in a city or village, is not negligence (Bentley v. Georgia Pac. R. Co., 86 Ala. 484; 6 So. 37). To the same effect, Carrington v. Louisville, etc. R. Co., 88 Ala. 472; 6 So. 910; Ward v. Southern Pac. Co. 25 Oreg. 433, 36 Pac. 166 [recognizing, however, the exceptions here stated]; McDermott v. Kentucky Central R. Co., 93 Ky. 408; 20 S. W. 380 [infant trespasser: no signals: backing train]; Oatts v. Cincinnati, etc. R. Co. [Ky.] 22 S. W. 330 [no signals]; Williams v.

Kansas City, etc. R. Co., 96 Mo. 275; 9 S. W. 573 [boy of twelve years injured while playing in switch-yard]; Brown v. St. Louis, etc. R. Co., 52 Ark. 120; 12 S. W. 203; Texas, etc. R. Co. v. Breadow, 90 Tex. 27; 36 S. W. 410 [could have seen but did not]; Woodruff v. Northern Pac. R. Co., 47 Fed. 689; Malone v. Boston & Alb. R. Co., 51 Hun, 532; 4 N. Y. Supp. 590.

¹² Philadelphia, etc. R. Co. v. Hummell, 44 Pa. St. 375 [track left open between two highways]. S. P., Townley v. Chicago, etc. R. Co., 53 Wisc. 626; 11 N. W. 55.

¹³ Chicago, etc. R. Co. v. McLaughlin, 47 Ill. 265; Chicago, etc. R. Co. v. Stumps, 55 Id. 367.

¹⁴ There was a well-beaten footpath across the tracks, which had been for years frequently and continuously traveled by grown people and children in going to and from each other's houses and to and from school. Held, that whether there had been such continuous and frequent use of the path, with the acquiescence of defendant, that its employees were bound to anticipate that a child would be on the path, and to keep a lookout on cars to prevent injury, was a question for the jury (Mason v. Chicago, etc. R. Co., 89 Wisc. 151; 61 N. W. 300). Where a train is running through a

mate result of the trainmen's failure to use ordinary care to keep watch for them, may recover damages if the trainmen could have seen them without difficulty, had they kept a reasonable watch, even though, in fact, they did not see them.¹⁵ Especially should this rule be applied where the railroad company has acquiesced in the use thus made of its property.¹⁶ We think that the courts which still adhere to the doctrine which confines liability to cases of actual knowledge of peril, only apply it to trespassers, and not to mere instances of negligence on the part of a plaintiff not trespassing. Of course there is no such duty to anticipate negligence as would require a railroad company to make its tracks safe for

populous neighborhood, just outside the city limits, where laborers have for years been accustomed to use the tracks in going to their work, and the employees on the train see, or, by the exercise of ordinary care, may see, a person on the track in time to avoid a collision, but fail to use such care, the company will be liable, though the person injured is guilty of contributory negligence (*Chamberlain v. Missouri Pac. R. Co.*, 133 Mo. 587; 34 S. W. 842; 33 Id. 437). Whether an engineer was negligent in running his train in the night across a bridge used in part by foot passengers, so as to run alongside of a pedestrian without any warning, causing such pedestrian, in his fright, to collide with the train, is a question for the jury (*Texas, etc. R. Co. v. Watkins*, 88 Tex. 20; 29 S. W. 232). The fact that other persons had occasionally trespassed on the track at the place of the accident cannot be considered in determining whether a trespasser injured was seen by the engineer in charge of the train (*Thomas v. Chicago, etc. R. Co.*, 93 Iowa, 248; 61 N. W. 967).

¹⁵ *Kreis v. Missouri Pac. R. Co.*, 131 Mo. 533; 33 S. W. 64, 1150; *Lynch v. St Joseph, etc. R. Co.*, 111 Mo. 601; 19 S. W. 1114; *Chicago, etc. R. Co.*

v. Wymore, 40 Neb. 645; 58 N. W. 1120. In *Cook v. Central R. Co.* (67 Ala. 533), it was held error to refuse to charge "that if defendant's agents did see, or *by the exercise of proper care could have seen* plaintiff's intestate upon said bridge or trestle in time to have stopped said train before it reached him, and that they failed to stop, the defendant was liable." s. P., *Pickett v. Wilmington, etc. R. Co.*, 117 N. C. 616; 23 S. E. 264; but see *Glass v. Memphis, etc. R. Co.*, 94 Ala. 581; 10 So. 215. An engineer is bound to anticipate some degree of carelessness on the part of persons crossing the track, when experience has proved it to be common (*Card v. Harlem R. Co.*, 50 Barb. 39). Where the engineer could not have seen a person wrongfully on the track until too late to stop the train in time to avoid the accident, no recovery could be had, as no default of the engineer could have been the cause of the injury (*Davidson v. Pittsburgh, etc. R. Co.*, 41 W. Va. 407; 23 S. E. 593).

¹⁶ *Harriman v. Pittsburgh, etc. R. Co.*, 45 Ohio St. 11; 12 N. E. 451; *Casida v. Oregon R. etc. Co.*, 14 Oreg. 551; 13 Pac. 438; *Powell v. Missouri Pac. R. Co.*, 59 Mo. App. 626.

the use of possible trespassers.¹⁷ Negligence of the defendant, in order to warrant recovery, notwithstanding contributory negligence of the plaintiff, must be subsequent to his.¹⁸

§ 485. Evidence of negligence.—As in other cases, mere evidence that the plaintiff was injured by the defendant's train, even at a highway crossing, is not enough to make out a case of negligence.¹ There must be some proof of mismanagement, inattention, defective construction, careless operation or the like,² unless there is some statute to the contrary, as in Georgia.³ And it must be shown that the negligent act was the proximate cause of the injury.⁴ Positive

¹⁷ The mere fact that a railroad company permits persons to walk on its tracks does not render it liable to one injured by a defective "frog" (Akers v. Chicago, etc. R. Co., 58 Minn. 540; 60 N. W. 669). One who is injured while trespassing on a railroad track cannot complain that the injury was owing to the size or weight of the train or to defective brakes, (Brown v. Louisville, etc. R. Co., 97 Ky. 228; 30 S. W. 639).

¹⁸ *Ib.*; Smith v. Norfolk, etc. R. Co., 114 N. C. 728; 19 S. E. 863, 923; Ward v. Southern Pac. R. Co., 25 Oreg. 433; 36 Pac. 166).

¹ Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Frech v. Philadelphia, etc. R. Co., 39 Md. 574, 576. The mere fact that a man is found dead under a railroad car does not raise a presumption that he came to his death through the negligence of the railroad company (Spears v. Chicago, etc. R. Co., 43 Neb. 720; 62 N. W. 68). The mere fact that a person was killed by a railway train, though the track was straight and clear, does not show a case of negligence sufficient to be submitted to a jury, where there is nothing to show how long he was on the track before being struck (Ward v. Southern Pac. Co., 25 Oreg. 433; 36 Pac. 166). To

same general effect, Hoskins v. Louisville, etc. R. Co., 97 Ky. 364; 30 S. W. 643.

² See §§ 57, 58, *ante*; Miller v. Chicago, etc. R. Co., 68 Wisc. 184; 31 N. W. 479. The doctrine of "*res ipsa loquitur*" applied (Howser v. Cumberland, etc. R. Co., 80 Md. 146; 30 Atl. 906).

³ East Tennessee, etc. R. Co. v. Hartley, 73 Ga. 5 [burden of rebutting presumption on defendant]. See § 467, *ante*.

⁴ It is not enough for the injured party to show that he was injured at the crossing, that no signal was given, and that such default of the railroad company was negligence; but he must further show that such default and negligence were the proximate cause of the injury (Omaha, etc. R. Co. v. Talbot, 48 Neb. 627; 67 N. W. 599; Central Tex. R. Co. v. Nycum, Tex. Civ. App. ; 34 S. W. 460). S. P., as to defective drawbar pin; held, that the complaint was demurrable, since it did not show that the collision would have been avoided if the pin had not broken (Evansville, etc. R. Co. v. Krapf, 143 Ind. 647; 36 N. E. 901). S. P., as to failure to place a headlight on the engine at night (Chicago, etc. R. Co. v. Bednorz, 57 Ill.

testimony that the head-light of an engine was burning, or that a bell or whistle was sounding, is entitled to more weight than negative evidence in relation to such facts;⁵ and where the affirmative evidence on such a point is clear, positive and detailed, a verdict against it cannot be allowed to stand on the negative testimony of persons who had no special facilities for knowing the facts.⁶ Of course, evidence of either care or want of care may be circumstantial;⁷ but a mere

App. 309). The blocking of the depot crossing not being the immediate cause of the injury, defendant was not liable, even if it had been its duty to have it open at the time (*Barkley v. Missouri Pac. R. Co.*, 96 Mo. 367; 9 S. W. 793). *s. p.*, *DuBoise v. N. Y. Central R. Co.*, 88 Hun, 10; 34 N. Y. Supp. 279. The proximate cause is not always, nor generally, the act or omission nearest in time or place to the effect it produced (*Union Pac. R. Co. v. Callaghan*, 56 Fed. 988).

⁵ *Chicago, etc. R. Co. v. Still*, 19 Ill. 499; see *Beisiegel v. N. Y. Central R. Co.*, 40 N. Y. 9, 19. Plaintiff testified that he saw no lights and heard no warning; driver and fireman testified that there were lamps on the engine and train, as usual; and porter testified that he saw and called to plaintiff not to cross; held, there was no evidence of negligence to go to the jury (*Ellis v. Great Western R. Co.*, L. R. 9 C. P. 551). To same effect, *Wabash, etc. R. Co. v. Hicks*, 13 Ill. App. 407; *Chicago, etc. R. Co. v. Robinson*, 106 Ill. 142; *Chicago, etc. R. Co. v. Dickson*, 88 Id. 431; *Chicago, etc. R. Co. v. Gretzner*, 46 Id. 74; *Chicago, etc. R. Co. v. Stumps*, 55 Id. 367; *Frizell v. Cole*, 42 Id. 362; *Hauser v. Central R. Co. of New Jersey*, 147 Pa. St. 440; 23 Atl. 766; *Clampit v. Chicago, etc. R. Co.*, 84 Iowa, 71; 50 N. W. 673. But the rule is not applicable to a case where plaintiff list-

ened for the bell or whistle within hearing distance, and did not hear either (*Annaker v. Chicago, etc. R. Co.*, 81 Iowa, 267; 47 N. W. 68). See *Campbell v. N. Y. Central R. Co.*, 49 Hun, 611; 3 N. Y. Supp. 694.

⁶ *Seibert v. Erie R. Co.*, 49 Barb. 583; *Ohio, etc. R. Co. v. Reed*, 40 Ill. App. 47 [proof by one or more witnesses that they did not hear the signals, without showing that they were so situated that they would have been likely to have heard them if sounded, not sufficient].

⁷ Omission to give proper signals on approaching a crossing need not be proved by direct and positive testimony, but it is sufficient if the jury believe from all the evidence that such signals were not given (*Illinois Cent. R. Co. v. Slater*, 129 Ill. 91; 21 N. E. 575). The testimony of a fireman, whose duty it is to ring the bell when the engine is in motion, "that, although he had no independent recollection of ringing it on a certain occasion, yet it was his uniform and invariable habit to ring it, so that it had become second nature with him to do so, and that from these facts he was able to state positively that he did ring it on the occasion referred to," is sufficient evidence to justify a finding that the bell was rung, notwithstanding the testimony of other witnesses that they were in position to have heard it if it had been rung, and that it was not rung (*Evison v. Chicago, etc. R.*

scintilla of evidence will not suffice.⁸ The admissibility of proof of similar negligence on previous occasions on the part of the railroad servants has been already discussed.⁹ Evidence

Co., 45 Minn. 370; 48 N. W. 6). Where the injury was caused by cars jumping the track, the jury is warranted in finding that the injury was due to excessive speed of the train, though there is no direct evidence that such speed was the cause of the cars leaving the track in the first instance (Walsh v. Missouri Pac. R. Co., 102 Mo. 582; 14 S. W. 873; 15 Id. 757).

⁸ See § 57, *ante*; applied in Morris v. Lake Shore, etc. R. Co., 148 N. Y. 182; 42 N. E. 579; DuBoise v. N. Y. Central R. Co., 88 Hun, 10; 34 Y. Supp. 279 [signals]. The mere running of a train behind its schedule time is not evidence which tends to prove negligence (Omaha, etc. R. Co. v. Talbot, 48 Neb. 637; 67 N. W. 599).

⁹ See § 60b, *ante*. Some further cases may be noted. That such evidence is inadmissible, has been held in Christensen v. Union Tr. Line, 6 Wash. St. 75; 32 Pac. 1018; Pennsylvania R. Co. v. Aiken [Pa.], 18 Atl. 619 [both on questions of rate of speed]. To the contrary, are the following cases. Where failure to give required signals is alleged, testimony that such signals were not given on the same train at another crossing a mile and a half further along is admissible (Atchison, etc. R. Co. v. Hague, 54 Kans. 284; 38 Pac. 257). In an action for an accident at a grade crossing, witnesses familiar with the locality may tell of narrow escapes they have had, to show the nature of the crossing, and the danger to travelers (Chicago, etc. R. Co. v. Netolicky, 14 C. C. A. 615; 67 Fed. 665). Evidence tending to show that on other occasions, when the

train was being backed towards the crossing in the same manner as when the accident occurred, travelers approaching the crossing as did decedent could not hear the train until they were almost upon it, is competent (Newstrom v. St. Paul, etc. R. Co., 61 Minn. 78; 63 N. W. 253). In an action for injuries received at a crossing, alleged to be the result of excessive speed, it is proper to show that during the two or three weeks before the collision the usual speed of the train, while passing the crossing, had been from forty to sixty miles an hour, that the jury may have some guide in finding the speed of the train when the collision occurred (Chicago, etc. R. Co. v. Spilker, 134 Ind. 380; 33 N. E. 280; 34 Id. 218). S. P., Ohio, etc. R. Co. v. Selby, 47 Ind. 471, 494; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103; 9 N. W. 575. In an action for death by a collision at a crossing where the speed of trains was limited by regulation, evidence that defendant's servants were in the habit of running at excessive speed and not ringing the bell is admissible (International, etc. R. Co. v. Kuehn, 2 Tex. Civ. App. 210; 21 S. W. 58). It is proper to show that no whistle was sounded when the train passed a crossing a mile distant from the one on which the accident occurred; that the person driving plaintiff's buggy was "a safe hand;" and that they were on their way to church when the accident occurred (Cincinnati, etc. R. Co. v. Howard, 124 Ind. 280; 24 N. E. 892). Mere evidence of accidents may raise a separate question. Thus, evidence that other accidents had occurred at the same crossing within

of contributory negligence of the plaintiff, on previous occasions, is not admissible.¹⁰ Where a question arises as to whether the defendant had notice of a state of facts which demanded precautions not taken, evidence of several instances is clearly admissible.¹¹ A rule of a company requiring trains to come to a full stop at certain crossings, may be presumed to express the views of the company as to safe management, and a violation of such a rule is some evidence of negligence.¹² Evidence of the distance which a train actually ran before it could be stopped is constantly received.¹³ Evidence of the distance within which a train could have been stopped is often received, either to show neglect in failing to stop or to show neglect in keeping cars in proper condition,¹⁴ or, on the other hand, to show that all possible care was used.¹⁵ For reasons elsewhere stated, evidence of precautions taken after an accident, to prevent its recurrence, is not admissible to prove negligence.¹⁶ But where the defendant attempts to disprove

a short time, is properly excluded (*Menard v. Boston, etc. R. Co.*, 150 Mass. 386; 23 N. E. 214; *Burke v. N. Y. Central R. Co.*, 66 Hun, 627; 20 N. Y. Supp. 808).

¹⁰ Evidence that plaintiff had negligently driven over the crossing two hours before the accident is not admissible to show negligence on his part at the time of the accident (*Delaware, etc. R. Co. v. Converse*, 139 U. S. 469; 11 S. Ct. 569).

¹¹ In an action for causing the death of a child, there was evidence that the accident was due to the driver's negligence in not observing the child in front of the car, because occupied in making change for a passenger. Held, that evidence that the cars at the point of accident were habitually crowded with passengers was admissible. If the cars were habitually crowded, the defendant was chargeable with notice thereof, and of the necessity of having a conductor (*Anderson v. Minneapolis R. Co.*, 43 Minn. 490; 44 N. W. 518).

¹² *Wood v. N. Y. Central R. Co.*, 70 N. Y. 195.

¹³ *Wren v. Louisville, etc. R. Co.* [Ky.] 20 S. W. 215.

¹⁴ *Dorman v. Broadway R. Co.*, 117 N. Y. 655; 23 N. E. 162 [horse car]; *Meagher v. Cooperstown, etc. R. Co.*, 75 Hun, 455; 27 N. Y. Supp. 504 [locomotive]; *Davidson v. Pittsburgh, etc. R. Co.*, 41 W. Va. 407; 23 S. E. 593; *Piper v. Chicago, etc. R. Co.* 77 Wisc. 247; 46 N. W. 165 [same]; *Reardon v. Missouri Pac. R. Co.*, 114 Mo. 384; 21 S. W. 731 [same]; *Wren v. Louisville, etc. R. Co.* [Ky.], 20 S. W. 215, and many other cases.

¹⁵ That the engineer failed to reverse his engine and apply the air brakes as soon as he saw the danger will not render the company liable, if it appears that the train could not have been stopped in time to avoid the accident (*Sinclair v. Chicago, etc. R. Co.*, 133 Mo. 233; 34 S. W. 76). See *Bamberger v. Citizens' R. Co.*, 95 Tenn. 18; 31 S. W. 163.

¹⁶ See § 60c, *ante*. The fact that after an accident at a crossing the company placed an automatic bell at the crossing is not competent evidence of prior negligence (*Hager v.*

negligence by showing that no similar accident has since occurred at the same place, the plaintiff has a right to prove that this is due to subsequent improvements.¹⁷

§ 485a. **Street cars.**—Street cars are not usually authorized to run at a very high speed; and the rights and duties of the railroad company and of travelers on the highway, respectively, are more analogous to those which govern in the case of ordinary vehicles, than to those which apply to steam railroads, owning the land under their tracks.¹ The distinction of duties rests upon the difference of ownership. In the absence of an explicit grant to that effect, it is never presumed that the state has given to a railroad company any exclusive title to a highway; and its use of rails and cars is regarded as only a more convenient form of using the highway, without imposing any new burdens upon the land.² It follows that the rights of street cars, no matter by what power impelled, are not superior to those of any other vehicles, but simply equal.³ Vehicles of all kinds, entitled to a general

Southern Pac. Co., 98 Cal. 309; 33 Pac. 119). S. P., as to placing a watchman at a crossing after an accident (Cleveland, etc. R. Co. v. Doerr, 41 Ill. App. 530). But in Pennsylvania, evidence that defendant, soon after the accident, erected gates at the crossing at which it occurred, is proper, where the jury is permitted to view the premises and see the gates (Lederman v. Pennsylvania R. Co., 165 Pa. St. 118; 30 Atl. 725).

¹⁷ Tetherow v. St. Joseph, etc. R. Co., 98 Mo. 74; 11 S. W. 310.

¹ Shea v. St. Paul R. Co., 50 Minn. 395; 52 N. W. 902; see Cooke v. Baltimore Tr. Co., 80 Md. 551; 31 Atl. 327; Newark R. Co. v. Block [Ct. Errors], 55 N. J. Law, 605; 27 Atl. 1067.

² People v. Kerr, 27 N. Y. 188; Citizens' Coach Co. v. Camden, etc. R. Co., 33 N. J. Eq. 267.

³ Cooke v. Baltimore Tr. Co., 80 Md. 551; 31 Atl. 327. This con-

clusion is inferred from the ground stated in the text, in Newark R. Co. v. Block [Ct. Errors], 55 N. J. Law, 605; 27 Atl. 1067; Shea v. St. Paul R. Co., 50 Minn. 395; 52 N. W. 902. A street-car has no superior right of way as against a vehicle going along a street which crosses the street-car track (O'Neil v. Dry-Dock, etc. R. Co., 129 N. Y. 125; 29 N. E. 84; Baltimore Tr. Co. v. Appel, 80 Md. 603; 31 Atl. 964; Watson v. Minneapolis R. Co., 53 Minn. 551; 55 N. W. 742; Zimmermann v. Union R. Co., 3 N. Y. App. Div. 219; 38 N. Y. Supp. 362). "Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other" (Omaha St. R. Co. v. Cameron, 43 Neb. 297; 61 N. W. 606). Even where, by statute or ordinance, such

use of the highway, including not only those drawn by horses,⁴ but also cycles,⁵ have as good a right to travel across or along and upon such a car-track, as upon any other part of the road.⁶ On the other hand, street cars of any kind, lawfully authorized to run on the streets, have as full right to run in accordance with the conditions of their construction and motive power as any other vehicles. No fault can be found with them on account of noise, inseparable from their careful operation;⁷ nor can they be required to deviate from their tracks or to give way to other vehicles. On the contrary, for the very same reasons which make it the duty of a slow and heavy wagon to move to one side, so far as may be necessary to enable a faster one to pass, or of a light wagon to deviate from its course, rather than to compel a heavy one to expend severe effort in turning aside,⁸ it is the obvious duty of any vehicle, either meeting a street car or going in front of it, to get out of its way.⁹ It has sometimes been said, in judicial opinions, that street cars have a paramount right to so much of the street as is included within their tracks.¹⁰ But these

priority is given, the cars may not be driven along the track, regardless of the presence of obstructing vehicles (*Thoresen v. La Crosse R. Co.*, 87 Wisc. 597; 58 N. W. 1051; *Laethem v. Fort Wayne, etc. R. Co.*, 100 Mich. 297; 58 N. W. 996).

⁴ In all the cases cited with respect to vehicles coming into collision with cars, except the next, horses or mules were used.

⁵ *Rooks v. Houston, etc. R. Co.*, 10 N. Y. App. Div. 98; 41 N. Y. Supp. 824.

⁶ *Adolph v. Central Park, etc. R. Co.*, 43 N. Y. Super. 199; *aff'd*, 76 N. Y. 530; *Lyman v. Union R. Co.*, 114 Mass. 83; *Glazebrook v. West End R. Co.*, 160 Mass. 239; 35 N. E. 553.

⁷ So held, as to electric cars, *McDonald v. Toledo R. Co.*, 20 C. C. A. 322; 74 Fed. 104; *North Side R. Co. v. Tippins* [Tex.], 14 S. W. 1067 [horses frightened by necessary sound of gong].

⁸ See § 652, *post*.

⁹ Where a person drives in front of an electric car, and is struck by it while attempting to turn off the track, the street railway is not liable, where there was no evidence that the speed was dangerous, or that the gong was not sounded (*Guilloz v. Ft. Wayne, etc. R. Co.*, Mich. ; 65 N. W. 666).

¹⁰ A street railway company's right to use that part of the street occupied by its tracks is paramount to the right of a person driving thereon (*Moore v. Kansas City, etc. R. Co.*, 126 Mo. 265; 29 S. W. 9). Similar language was used by Earl, J., in *Fleckenstein v. Dry-Dock, etc. R. Co.*, 105 N. Y. 655; 11 N. E. 951; and *O'Neil v. Same*, 129 N. Y. 125; 29 N. E. 84; but it was not at all necessary to the decision in either case.

were mere *obiter dicta*; and the doctrine here stated is established, both on principle and authority.¹¹ The right of a street car to the use of its tracks, in a street having sidewalks, is superior to the rights of foot passengers,¹² except at street crossings, where they are equal;¹³ but that is equally true of any other vehicle. As they cannot turn out of their fixed course, the usual law of the road does not apply to street railroad cars or to any vehicle meeting them;¹⁴ and, if the road is narrow, other vehicles must give way.¹⁵ Ordinary care, but no more, is required from the operators of street cars, no matter what may be the motive power used;¹⁶ but the kind of care to be used must be such as prudent men, in the protection of themselves from injury, would use with regard to such motive power. All useful appliances, in common use, must be provided to guard against dangers to travelers.¹⁷ Signals are usually required from street cars, by ordinance, when approaching crossings or persons; and horse cars run so smoothly, that they may be required to carry bells, ringing continuously.¹⁸ It is, of course, negligence to disobey such ordinances;¹⁹ but juries may, within, reasonable limits, hold

¹¹ A charge that "a street car has a right of way on that portion of the street upon which alone it can travel, paramount to that of ordinary vehicles," is error (*Lake Roland R. Co. v. McKewen*, 80 Md. 593; 31 Atl. 797). It is not error to refuse to charge that the cars of a street railway have a paramount right of way in the streets (*Cincinnati R. Co. v. Whitcomb*, 66 Fed. 915; 14 C. C. A. 183).

¹² *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625; 26 N. E. 967.

¹³ At crossings, street cars and pedestrians have equal rights to the use of the streets (*Schulman v. Houston, etc. R. Co.*, 15 N. Y. Misc. 30; 36 N. Y. Supp. 439).

¹⁴ *Hegan v. Eighth Ave. R. Co.*, 15 N. Y. 380; *Spurrier v. Front St. R. Co.*, 3 Wash. St. 659; 29 Pac. 346 [vehicle meeting cable car, not bound to turn to the right]. The law of the road does not apply in a

collision between a vehicle and a locomotive at a highway crossing (*Conaty v. N. Y., New Haven, etc. R. Co.*, 164 Mass. 572; 42 N. E. 103).

¹⁵ See *Suydam v. Grand St. R. Co.*, 41 Barb. 375.

¹⁶ *Schmidt v. Steinway, etc. R. Co.*, 132 N. Y. 566; 30 N. E. 389; *Cornell v. Detroit R. Co.*, 82 Mich. 495; 46 N. W. 791.

¹⁷ As it is the defendant's duty to have its cars under control at street crossings, the jury may consider whether the car could have been stopped more easily if the sand box, approved for use under such circumstances, had been filled with sand (*Penny v. Rochester R. Co.*, 7 N. Y. App. Div. 595).

¹⁸ This is usually required of horse-cars, but not of other cars, as they make noise enough (*Kuhnen v. Union R. Co.*, 10 N. Y. App. Div. 195; 41 N. Y. Supp. 774).

¹⁹ See § 13, *ante*.

street cars to be subject to such obligations, where there is no ordinance.²⁰ Unless unusual speed is expressly permitted by law, the speed of street cars ought to be no greater than is reasonable and consistent with the customary use of the road by the public, in safety. Almost always, it is limited by statute or ordinance, to a moderate rate. Any speed in excess of the allowable rate is at least evidence of negligence.²¹ Some street railroad companies overload their servants with work, to such an extent as to make it difficult for the latter to give proper attention to all their duties. Where this occurs, the company is guilty of negligence, which will make it responsible for any failure of the overworked servant to guard against accidents, even though the servant himself performed his duties to the utmost of his ability,²²

§ 485b. Electric and cable cars.—The wide spread change of motive power on street railroads, from horses to cables or electricity, by making possible an almost indefinite increase of speed, has increased the obligation and raised the standard of duty in the management of such care, without increasing their privileges on the streets, except so far as to allow a reasonable and safe increase of speed. The operator of such a car must, therefore, to an extent commensurate with the new hazards incurred by the new power, “enlarge the degree of vigilance and care necessary to avoid injuries, which its own appliances have made more imminent.”¹ It is negligence to run such cars at a high speed, where many people are constantly passing and likely to cross, or at a regular crossing,² or in a dark and

²⁰Johnson v. Hudson River R. Co., 20 N. Y. 65 [bells on horse-car]. s. p., as to other appliances, Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 S. Ct. 679; Roth v. Metropolitan R. Co., 34 N. Y. Supp. 232; 13 N. Y. Misc. 213.

²¹In the absence of evidence to explain it, the running of the car at a rate of speed forbidden by ordinance was negligence *per se* (Riley v. Salt Lake Tr. Co., 10 Utah, 428; 37 Pac. 681). A vehicle was struck by a car coming at full speed around

the curve from behind, without giving warning; held, gross negligence (Cooke v. Baltimore Tr. Co., 80 Md. 551; 31 Atl. 327).

²²Anderson v. Minneapolis St. R. Co., 42 Minn. 490; 44 N. W. 518 [driver, overloaded with work, could not keep watch: master liable].

¹Cooke v. Baltimore Tr. Co., 80 Md. 551; 31 Atl. 327.

²Cases cited in notes 16 and 17, § 425a, *ante*; and notes 19 and 20, next section.

narrow street at night.³ If the operators of such cars have notice of a negligent or even unlawful use of the streets, at particular places, especially by children, they must keep vigilant watch at and near such places, and must have their cars well under control.⁴ Electric cars, as at present run, carry gongs, which make so much noise as to raise a new class of questions. While it would be negligence not to ring them at all, it is also negligence to ring them to excess, and especially to persist in ringing them, when the noise is likely to frighten horses or other animals,⁵ without some special reason for doing so, outweighing the danger to the animals. They certainly are not required to ring continuously.⁶

§ 485c. Street cars: contributory negligence. -- The rules as to what will constitute contributory negligence where street cars are concerned, are, in some respects, quite different from those which are applied to steam railroads, running on their own land. All questions as to trespasses are eliminated. No actual traveler, even on foot, can be a trespasser on a highway, however negligent he may be in its use.¹ There can be no

³ It is negligence to run an electric street-car along a narrow and unlighted alley, on a dark night, so fast that it cannot be stopped within the distance covered by its own headlight (*Gilmore v. Federal St. R. Co.* 153 Pa. St. 31; 25 Atl. 651).

⁴ *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543; 50 N. W. 690 [children unlawfully coasting across the track].

⁵ Where a horse, standing near a street-car track, is alarmed by a car, the ringing of the car gong violently so as to produce greater alarm may constitute negligence (*Philadelphia Traction Co. v. Lightcap*, 10 C. C. A. 46; 61 Fed. 762; approving *S. C.*, 60 Fed. 212). The jury are warranted in finding that an electric street-railway company was negligent in sounding the gong, and not slacking the speed of the car which was coming up behind an obviously

frightened team (*Benjamin v. Holyoke St. R. Co.*, 160 Mass. 3; 35 N. E. 95). And the failure of a motor-man to see the frightened condition of a horse, when he may see it by the exercise of reasonable care, is negligence (*Ellis v. Lynn, etc. R. Co.*, 160 Mass. 341; 35 N. E. 1127).

⁶ *Kuhnen v. Union R. Co.*, 10 N. Y. App. Div. 195; 41 N. Y. Supp. 774.

¹ *Tobin v. Missouri Pac. R. Co.* [Mo.], 18 S. W. 996; *Mitchell v. Tacoma R. Co.*, 9 Wash. St. 120; 37 Pac. 341. The fact that a child was playing, at the time of the accident, in the public street, through which the defendant's train regularly ran, does not show negligence *per se* (*Louisville, etc. R. Co. v. Sears*, 11 Ind. App. 654; 38 N. E. 837). To charge that "the rights of the railway company and of the public are not equal, but the right of the company is superior to the right of the

analogy between the case of a trespasser upon the private property of a railroad company and a traveler upon a street railroad.² As already stated, travelers may walk, ride or drive either across or along the track, just as freely as upon any other part of the street, so long as they do not obstruct the cars or rashly expose themselves to danger.³ Travelers may assume that street cars will give proper signals and not run at excessive speed,⁴ and they may properly walk, ride or drive across or even along the track, in full view of an approaching street car, if, under all the circumstances, it is consistent with ordinary prudence to do so.⁵ And while, generally speaking, one

traveling public on all parts of its track, even at crossings," held, error (Texas, etc. R. Co. v. Cody, 67 Fed. 71; 14 C. C. A. 310).

² There is no analogy between the duties of a street car (no matter what power used) to persons on highway and the duties of a steam locomotive to trespassers (Cooke v. Baltimore Tr. Co., 80 Md. 551; 31 Atl. 327). Where the motorman would have seen the boy in time to have prevented the accident had he been looking ahead, instead of standing half turned, talking to a passenger, it was proper to refuse a nonsuit (Duncan v. Rome R. Co., Ga. ; 24 S. E. 953).

³ See § 485a, *ante*.

⁴ As to allowable speed, see § 485a, *ante*. As to signals, see Rooks v. Houston St. R., etc. Co., 10 N. Y. App. Div. 98.

⁵ Brooks v. Lincoln St. R. Co., 22 Neb. 816; 36 N. W. 529; Swain v. Fourteenth St. R. Co., 93 Cal. 179; 28 Pac. 829; Rascher v. East Detroit, etc. R. Co., 90 Mich. 413; 51 N. W. 463 [electric road]. It is not contributory negligence, as a matter of law, for a person to drive on a street occupied by an electric railway, even though the cars cause noise calculated to frighten horses, and the space between the track and the retaining wall is narrow (Gibbons v. Wilkes-

Barre, etc. R. Co., 155 Pa. St. 279; 26 Atl. 417). S. P., Muncie St. R. Co. v. Maynard, 5 Ind. App. 372; 32 N. E. 343. It is not negligence, as a matter of law, to cross the track obliquely (Lynch v. New Rochelle, 78 Hun, 207; 28 N. Y. Supp. 962); or to drive a heavily loaded wagon on a street-car track, though a car is approaching at a distance of 100 feet (Cross v. California St. Cable R. Co., 102 Cal. 313; 36 Pac. 673); or to attempt to cross the tracks when the car is eighty feet distant and approaching at the rate of seven miles an hour (Reilly v. Third Ave. R. Co., 16 N. Y. Misc. 11; 37 N. Y. Supp. 593). Drivers of teams have a right to cross the tracks of street railways, although they know that a car is approaching, exercising care to avoid a collision (Smith v. Metropolitan R. Co., 7 N. Y. App. Div. 253; 40 N. Y. Supp. 148). But a driver is not at liberty to make close calculations and take doubtful chances (McClain v. Brooklyn R. Co., 116 N. Y. 459; 22 N. E. 1062; Clancy v. Troy, etc. R. Co., 88 Hun, 496; 34 N. Y. Supp. 877; Graff v. Detroit City R. Co., Mich. ; 67 N. W. 815; Watson v. Mound City R. Co., 133 Mo. 246; 34 S. W. 573; O'Connell v. St. Paul R. Co., 64 Minn. 466; 67 N. W. 363 [reckoning by seconds]).

who is about to cross a street railroad should both look and listen for cars,⁶ this is not an inflexible rule; nor is it to be enforced with any such strictness as in the case of an ordinary steam railroad.⁷ It is not negligence, as matter of law, to omit so to do.⁸ The question is whether a prudent man, acting prudently, would have thought it unnecessary to do so.⁹ And it is never, even in Pennsylvania, held necessary to stop, before crossing a street railroad,¹⁰ unless, perhaps, where the

⁶ *Thompson v. Buffalo R. Co.*, 142 N. Y. 196; 39 N. E. 709; *Creamer v. West End R. Co.*, 156 Mass. 320; 31 N. E. 391; *Carson v. Federal St. R. Co.*, 147 Pa. St. 219; 23 Atl. 369; *Everett v. Los Angeles R. Co.*, 115 Cal. 105; 43 Pac. 207; *Metropolitan R. Co. v. Johnson*, 90 Ga. 500; 16 S. E. 49; *Highland Ave., etc. R. Co. v. Sampson*, Ala. ; 20 So. 566; *McGee v. Consolidated R. Co.*, 102 Mich. 107; 60 N. W. 293; *Blakeslee v. Consolidated R. Co.*, 105 Mich. 462; 63 N. W. 401; *Hickey v. St. Paul R. Co.*, 60 Minn. 119; 61 N. W. 893; *Sonnenfeld Co. v. People's R. Co.*, 59 Mo. App. 668.

⁷ The degree of care required of pedestrians at the crossing of a highway and a steam railway in looking up and down the track is not necessarily the test of care required in crossing the track of a street railway on a public street (*Holmgren v. Twin City R. T. Co.*, 61 Minn. 85; 63 N. W. 270; *Shea v. St. Paul R. Co.*, 50 Minn. 395; 52 N. W. 902; *Consolidated Tr. Co. v. Scott*, 58 N. J. Law, 682; 33 Atl. 1094; s. p., *Muncie R. Co. v. Maynard*, 5 Ind. App. 372; 32 N. E. 343). A bicycle rider may use the slot of a cable road, and need not look behind him for cars which give no signals (*Rooks v. Houston, etc. R. Co.*, 10 N. Y. App. Div. 98). But he must listen for signals behind him (*Everett v. Los Angeles R. Co.*, 115 Cal. 105; 43 Pac. 207).

⁸ Failure to look and listen before

crossing the tracks of an electric railway in a public street, where the cars have not an exclusive right of way, is not negligence, as a matter of law (*Robbins v. Springfield R. Co.*, 165 Mass. 30; 42 N. E. 334; *Consolidated Tr. Co. v. Scott* [Ct. Errors] 58 N. J. Law, 682; 34 Atl. 1094; *Shea v. St. Paul R. Co.*, 50 Minn. 395; 52 N. W. 902; *Kelly v. Brooklyn Heights R. Co.*, 33 N. Y. Supp. 851; 12 N. Y. Misc. 568; *Springfield R. Co. v. Clark*, 51 Ill. App. 626; *Hall v. Ogden R. Co.*, 13 Utah, 243; 44 Pac. 1046). So held, as to crossing streets, at other points than regular crossings, with reference to ordinary wagons (*Moebus v. Herrmann*, 108 N. Y. 349; 15 N. E. 415; followed, with reference to street railroads, *Pyne v. Broadway, etc. R. Co.*, 19 N. Y. Supp. 217). See *Doller v. Union R. Co.*, 7 N. Y. App. Div. 283. In Pennsylvania, one about to cross a street railway track is bound, on reaching the track, to look in both directions for an approaching car, and failure so to do is negligence *per se* (*Ehrisman v. East Harrisburg R. Co.*, 150 Pa. St. 180; 24 Atl. 596; *Omslaer v. Pittsburgh etc., Tr. Co.*, 168 Pa. St. 519; 32 Atl. 50).

⁹ *Newark R. Co. v. Block* [Ct. Errors], 55 N. J. Law, 605; 27 Atl. 1067.

¹⁰ A person is not required to stop, as well as look and listen, before crossing the tracks of a street railway (*Cincinnati R. Co. v. Whitcomb*,

traveler cannot see, without stopping. It is not negligence, on the part of one lawfully working upon alterations in a street, to do such work between or near car-tracks, when the nature of the work requires it.¹¹ While a vehicle may lawfully stand upon a street railroad, obstructing cars, for a necessary purpose, which cannot be otherwise attained, it can only do so for a reasonable time, and must be promptly removed;¹² and it is contributory negligence thus to obstruct the track at night, without giving warning to approaching cars.¹³ The operator of a street car, especially if it is impelled by cable or electric power, is bound to keep a constant watch for persons and vehicles on the street,¹⁴ and although he is not bound to anticipate that foot-passengers will attempt to cross, otherwise than at regular crossings, and, therefore, need not maintain quite the same degree of vigilance elsewhere,¹⁵ he is always held responsible for failing to see even persons crossing at other places, if he would have seen them, had he been in the exercise of ordinary care.¹⁶ The rule exempting

66 Fed. 915; 14 C. C. A. 183; *Omslaer v. Pittsburgh, etc. Traction Co.*, 168 Pa. St. 519; 32 Atl. 50).

¹¹ So held, where such work was done for the city (*Owens v. People's R. Co.*, 155 Pa. St. 334; 26 Atl. 748; *Lahey v. Central Park R. Co.*, 22 N. Y. Supp. 380; 2 N. Y. Misc. 537; *Houston R. Co. v. Woodlock* [Tex. Civ. App], 29 S. W. 817).

¹² *Lahey v. Central Park R. Co.*, 2 N. Y. Misc. 537; 22 N. Y. Supp. 380; as explained by *O'Neill v. Third Ave. R. Co.*, 3 N. Y. Misc. 521; 23 N. Y. Supp. 20.

¹³ *Winter v. Federal St. etc. R. Co.*, 153 Pa. St. 26; 25 Atl. 1028.

¹⁴ *Baltimore Traction Co. v. Wallace*, 77 Md. 435; 26 Atl. 518. The driver of an electric car, while making change for a passenger, failed to notice a child three years of age, which was crossing the track, and the car ran into the child. Held, the company was liable (*Barnes v. Shreveport R. Co.*, 47 La. Ann. 1218; 17 So. 782).

¹⁵ The motorman of a street car is not expected to look out for pedestrians as vigilantly between crossings as he is at street crossings (*Kuhnen v. Union R. Co.*, 10 N. Y. App. Div. 195).

¹⁶ *Newark R. Co. v. Block*, *supra*; *Johnson v. Reading R. Co.*, 160 Pa. St. 647; 28 Atl. 1001. Though plaintiff was wanting in ordinary care in attempting to cross defendant's tracks, he may recover if defendant's employee, in the exercise of ordinary care, might have avoided the accident after he saw plaintiff, or by the use of ordinary care might have seen that plaintiff was in danger of being struck (*Baltimore Tr. Co. v. Appel*, 80 Md. 603; 31 Atl. 964). *s. p.*, *Baltimore Tr. Co. v. Wallace*, 77 Md. 435; 26 Atl. 518 [able to discover peril]; *North Baltimore R. Co. v. Arnreich*, 78 Md. 589; 28 Atl. 809; *Citizens' St. R. Co. v. Steen*, 42 Ark. 321 [could have discovered]; *West Chicago R. Co. v. Camp*, 46 Ill. App. 503 [same].

railroads from responsibility where trainmen do not in fact see a person on the track, if it is good law anywhere, certainly applies only against trespassers, and therefore does not apply to city streets or street-cars. The operator of a street-car has no right to assume that no one will attempt to cross in view of a car;¹⁷ but must check its speed, as soon as he sees or ought to see that one is about to cross,¹⁸ and he must have the car well under control at street crossings.¹⁹ No matter how

¹⁷See note 5, *supra*. Under testimony that when a child started from the curb, which was about seven feet from the rail, to cross a street in the middle of a block, the motorman was looking to the side of the street, and that, after being hallooed to twice, he looked in front of him just as the child was struck, the question of negligence is for the jury (*Evers v. Philadelphia Tr. Co.*, 176 Pa. St. 376; 35 Atl. 140). But he may presume that a person (other than a child) approaching the track will not recklessly cross (*Schulte v. New Orleans, etc. R. Co.*, 44 La. Ann. 509; 10 So. 811).

¹⁸*Smith v. Metropolitan St. R. Co.*, 7 N. Y. App. Div. 253; 40 N. Y. Supp. 148; *Wells v. Brooklyn R. Co.*, 58 Hun, 389; 12 N. Y. Supp. 67; *Timony v. Brooklyn, etc. R. Co.*, 30 N. Y. Supp. 1071; 10 N. Y. Misc. 261; *Winters v. Kansas City R. Co.*, 99 Mo. 509; 12 S. W. 652 [little child "toddled" on track]. It is a question for the jury (*Thatcher v. Central Tr. Co.*, 166 Pa. St. 66; 30 Atl. 1048; *Little v. Superior R. Co.*, 88 Wisc. 402; 60 N. W. 705). A gripman of a cable street railway must, when it is apparent that a pedestrian is about to place himself in danger, use every possible effort, consistent with the safety of the passengers, to avoid injury to him (*Bunyan v. Citizen's R. Co.*, 127 Mo. 12; 29 S. W. 812). *S. P., Houston R. Co. v. Woodlock*, Tex. Civ. App. ; 29 S. W. 817.

But he is not bound to stop on observing a wagon on the track ahead of his train, unless it is sufficiently near to be reasonably considered in peril (*Sonnenfeld Co. v. People's R. Co.*, 59 Mo. App. 668). He is not required to check the car on seeing a pedestrian approaching the track, as he has the right to assume that the pedestrian will use reasonable precautions to avoid danger (*Bunyan v. Citizens' R. Co.*, 127 Mo. 12; 29 S. W. 842). At all events, a jury may so find (*Savannah, etc. R. Co. v. Bryan*, 94 Ga. 632; 21 N. E. 57; see *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583; 30 N. E. 752).

¹⁹*Penny v. Rochester R. Co.*, 7 N. Y. App. Div. 595; 40 N. Y. Supp. 172; *Watson v. Minneapolis R. Co.*, 53 Minn. 551; 55 N. W. 742. Where a child is discovered on the track, in front of a moving street car, by the servant operating it, or is seen approaching the track, with the apparent purpose of crossing, the highest degree of care must be exercised to prevent injury (*San Antonio R. Co. v. Mechler*, 87 Tex. 628; 30 S. W. 899; *Wallace v. Suburban R. Co.*, 26 Oreg. 174; 37 Pac. 477 [car run over crossing at ten miles an hour; nonsuit properly refused]; *Hedin v. Suburban R. Co.*, 26 Oreg. 155; 37 Pac. 540). But one in charge of an electric street car need not stop before reaching a crossing, for the purpose of looking and listen-

much another person may be in fault, the operator of a car is still bound to use care to avoid injury to him.²⁰

ing, when no danger is apparent. way, the car-driver must use care (Savannah, etc. R. Co. v. Beasley, to avoid collision (Chicago R. Co. 94 Ga. 142; 21 S. E. 285). v. Ingraham, 131 Ill. 659; 23 N. E.

²⁰ Even though another vehicle 350).
improperly refuses to get out of the

PART V.

CARRIERS.

CHAPTER XXII. CARRIERS OF PASSENGERS.

XXIII. TELEGRAPHS.

CHAPTER XXII.

CARRIERS OF PASSENGERS.*

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| <p>§ 486. Obligations of carrier not merely in contract.</p> <p>487. Who are common carriers of passengers.</p> <p>488. Who deemed passengers.</p> <p>489. Who not passengers.</p> <p>490. When relation begins and ends.</p> <p>491. Liability to free passengers.</p> <p>492. Who are not free passengers.</p> <p>492<i>a</i>. Quasi passengers.</p> <p>493. Ejection of passenger.</p> <p>494. Carrier not insurer.</p> <p>495. Degree of care required.</p> <p>496. Application of the rule requiring great care.</p> | <p>§ 497. Obligation as to vehicle.</p> <p>498. Exception as to certain vehicles.</p> <p>499. Carrier's liability for the condition of the road.</p> <p>500. Liability for acts of strangers.</p> <p>501. When ordinary care only required.</p> <p>502. Liability in case of divided ownership.</p> <p>503. Accidents beyond carrier's line.</p> <p>504. Limitation of liability by notice or contract.</p> <p>505. Validity of restrictions on liability.</p> |
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*The obligations of carriers of goods are absolute; and their liability does not depend upon their being negligent. For this reason we have not considered that subject as falling within the scope of this treatise. Nor do we undertake to give here a statement of all the law concerning even carriers of passen-

gers. On the contrary, we purposely aim to omit everything which does not bear upon questions of *negligence*, although referring to many cases in which negligence was not in issue, but which afford useful if not indispensable aid to a comprehension of decisions upon that issue.

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| <p>§ 506. Approaches, accommodations, etc.</p> <p>507. [Consolidated with § 490].</p> <p>508. Negligence in starting and stopping.</p> <p>509. Duty to passengers alighting.</p> <p>510. Duty to assist passengers in getting on and off.</p> <p>511. Duty to maintain guard against egress.</p> <p>512. Duty to preserve order.</p> <p>513. Liability for servant's malicious acts.</p> <p>513a. Passengers on freight trains.</p> <p>514. Obligations of stage-coach proprietors.</p> <p>515. Obligations of carriers by steam vessels.</p> | <p>§ 516. Presumption of negligence.</p> <p>517. Presumption of negligence, how rebutted.</p> <p>518. Evidence.</p> <p>519. Contributory negligence.</p> <p>520. Getting on and off moving vehicle.</p> <p>521. Getting on and off in other cases.</p> <p>522. Statutes as to platforms, etc.</p> <p>523. Passengers in improper place.</p> <p>524. Changing places on train.</p> <p>525. Crossing tracks.</p> <p>526. Care of passengers' personal effects.</p> <p>527. [Omitted.]</p> |
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§ 486. **Obligation of carrier not merely in contract.** — The obligations of a common carrier of persons, though usually sanctioned by express or implied contract, are by no means dependent upon contract exclusively, or even mainly, for their existence. They owe their origin chiefly to the policy of the common law, adopted for the protection of human life, and to various statutory enactments in furtherance of that policy.¹ This will plainly appear from the rules which govern the obligations of carriers to gratuitous passengers, and from the limi-

¹ *Nolton v. Western R. Co.*, 15 N. Y. 444; *Carroll v. Staten Isl. R. Co.*, 58 Id. 126; *Phila., etc. R. Co. v. Derby*, 14 How. U. S. 468; *Hannibal, etc. R. Co. v. Swift*, 12 Wall. 262; *Great Northern R. Co. v. Harrison*, 10 Exch. 376; *Gillenwater v. Madison, etc. R. Co.*, 5 Ind. 339; *Ohio, etc. R. Co. v. Muhling*, 30 Ill. 9. The carrier of passengers owes a duty to them as carrier, though there may be no privity of contract between him and them. Thus, the owners of a line of canal boats, engaged in the business of common carriers of passengers and goods, who charter a boat to another transportation company for a single trip, retaining the charge of it and navigating it with their own master and crew, are liable to a passenger for the loss of his goods upon the passage (*Campbell v. Perkins*, 8 N. Y. 430). *s. p.*, *Delaware, etc. R. Co. v. Trautwein*, 52 N. J. Law, 169; 19 Atl. 178; *Eaton v. Boston & Lowell R. Co.*, 11 Allen, 500; *McElroy v. Nashua, etc. R. Co.*, 4 Cush. 400; *Union Pac. R. Co. v. Nichols*, 8 Kans. 505; *New Orleans, etc. R. Co. v. Hurst*, 36 Miss. 660. In *Marshall v. York, etc. R. Co.* (11 C. B. 655), a master took a ticket for his servant. Held, that the servant's action for injuries would lie, "not by reason of any contract between him and the company, but by reason of the duty implied by law to carry him safely."

tations which are affixed to their power to make contracts exempting themselves from liability. Therefore the refusal of a common carrier to accept a passenger must be,² and his wrongful ejection of a passenger, with or without unnecessary force, may be³ the subject of an action in tort, rather than in contract. And the right of election exists in any case of positive misfeasance to a passenger.⁴ Nevertheless, the legal obligations of a carrier, being called into activity by the action of each person separately who offers himself as a passenger, are in the nature of a contract; and no one can complain of their breach except the person with whom or for whose benefit the contract was made, or some one representing his rights.⁵

§ 487. Who are common carriers of passengers.—Any one making it a regular business to carry persons for hire or advantage of any kind, is a common carrier between the places to and from which he is accustomed to transport persons.¹ The

² The wrongful refusal of a railway company to carry a passenger, who has entered its trains, to his destination, is ordinarily a tort, and not a breach of contract (*Lake Erie, etc. R. Co. v. Acres*, 108 Ind. 548; 9 N. E. 453).

³ *Central R., etc. Co. v. Roberts*, 91 Ga. 513; 18 S. E. 315; *Pittsburgh, etc. R. Co. v. Russ*, 6 C. C. A. 597; 57 Fed. 822; *Denver Tramway Co. v. Cloud*, 16 Colo. App. 445; 40 Pac. 779; *Poulin v. Canadian Pac. R. Co.*, 47 Fed. 858. An action on the case in tort is proper against a carrier for wrongfully ejecting from its train a passenger who has paid his fare, though no force was used in ejecting him (*Boster v. Chesapeake, etc. R. Co.*, 36 W. Va. 318; 15 S. E. 158). Or the action may be brought on the contract (*Johnson v. Northern Pac. R. Co.*, 46 Fed. 347).

⁴ *Taylor v. Manchester, etc. R.* [1895], 1 Q. B. 134; *Mace v. Reed*, 89 Wisc. 440; 62 N. W. 186 [assault on passenger].

⁵ *Bricker v. Phila., etc. R. Co.*,

132 Pa. St. 1; 18 Atl. 983; *Penn. R. Co. v. Price*, 96 Pa. St. 256; *Fairmount, etc. R. Co. v. Stutler*, 54 Id. 375; *Alton v. Midland R. Co.*, 19 C. B. N. S. 213. But this rule does not prevent a recovery, under a statute authorizing a parent, etc., to sue in case of death caused by negligence (*Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 495).

¹ *Bennett v. Peninsula Steam P. Co.*, 6 U. B. 775. Defendant's sole business was logging, and it had never authorized the use of its road for carrying passengers; but defendant's general superintendent had instructed plaintiff, who had come to the logging camp in search of work, to get on the train, and go for his blankets, so as to return and go to work, and there was evidence that the trains were used, with the knowledge of defendant, for carrying people up and down the road. Held, not error to refuse to direct a verdict for defendant (*Albion Lumber Co. v. De Nobra*, 19 C. C. A. 168; 72 Fed. 739).

owner of a stage,² a railroad car, a ship,³ a ferry-boat⁴ or a passenger elevator⁵ is, if he carries on such a business by means of such vehicles, a common carrier of persons.

§ 488. Who deemed passengers.—A passenger is a person who undertakes, with the consent of the carrier or by other lawful title¹ to travel in a conveyance provided by the latter, otherwise than in the service of the carrier as such.² Any acts

² *Stokes v. Saltonstall*, 13 Pet. 181; *Bennett v. Dutton*, 10 N. H. 481; *Buffit v. Troy, etc. R. Co.*, 40 N. Y. 168; *Farish v. Reigle*, 11 Gratt. 697; *Boyce v. California Stage Co.*, 25 Cal. 468; *Lawrence v. Green*, 70 Id. 417; 11 Pac. 750.

³ *Dodge v. Boston, etc. S. S. Co.*, 148 Mass. 207; 19 N. E. 373 [steamship]; *Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306.

⁴ *Shimmer v. Merry*, 23 Iowa, 90; *Dudley v. Camden, etc. R. Co.*, 42 N. J. Law, 25; *Wyckoff v. Queens Ferry Co.*, 52 N. Y. 33; *White v. Winnisimmet Co.*, 7 Cush. 155.

⁵ *Goodsell v. Taylor*, 41 Minn. 207; *Treadwell v. Whittier*, 80 Cal. 574. The liability for negligent operation of passenger elevators is stated in ch. xxxvi, *post*.

¹ In general, the consent of the carrier is necessary. A railroad company owes no duty of safe carriage to one who is on its train without its knowledge or consent, and in a place where its employees in the discharge of their ordinary duties would not discover him, though it is the intention of such person to pay his fare (*Bricker v. Philadelphia, etc. R. Co.*, 132 Pa. St. 1; 18 Atl. 983). One riding by invitation of the carrier, without charge, to see his agent with a view of negotiating for the use of a patented article by the carrier is a passenger for hire (*Grand Trunk R. Co. v. Stevens*, 95 U. S. 655). A passenger on a train by invitation of

the general agent of the railroad company, for the purpose of inspecting levees protecting the road, can recover for injuries received through the negligence of the company (*Thompson v. Yazoo, etc. R. Co.*, 47 La. Ann. 1107; 17 So. 503). One who, though in possession of a ticket, yet acts so recklessly that the carrier would not be bound to receive him, is not a passenger until he actually reaches the train (*Webster v. Fitchburg R. Co.*, 161 Mass. 298; 37 N. E. 165).

² Of course a servant, employed in the very work of carrying, is not a passenger. On the other hand, servants of a carrier, not employed in operating the vehicle or train in which, or railroad over which, they travel, are evidently passengers. (*Denver, etc. Tr. Co. v. Dwyer*, 20 Colo. 132; 36 Pac. 1106). In Pennsylvania, it has been held that a mail-agent of the United States while traveling on a train in the performance of his duties, is not a passenger (*Pennsylvania R. Co. v. Price*, 96 Pa. St. 256; appeal dismissed, 113 U. S. 218). We cannot comprehend this decision, and it is nowhere followed. The very reverse was held, more recently, in *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455; 16 S. W. 849; *Louisville, etc. R. Co. v. Kingman* [Ky.], 35 S. W. 264; *Norfolk, etc. R. Co. v. Shott*, 92 Va. 34; 22 S. E. 811; and see cases cited in note 3, § 492, *post*.

indicating, on the one side, an offer or request to be carried, and, on the other side, an acceptance of such offer or request, are sufficient to constitute the relation of carrier or passenger.³ The question of a person's right to claim a passage is immaterial for this purpose, if the carrier accepts him as such.⁴ On the other hand, the carrier's refusal to accept a person as a passenger is immaterial, if such person has a legal right to become a passenger, has paid or is ready to pay his fare and has succeeded in entering the vehicle.⁵ There must be, however, a real intention to travel, in the same manner as other persons, in order to make one a passenger. A mere entry upon the vehicle, for a temporary purpose, with no intention of being carried, except as an unavoidable incident of the entry, is not enough.⁶ The purchase of a ticket from the carrier, by a per-

³ The driver of the coach was informed, before the accident, that a passenger was to be left at plaintiff's destination, and after the accident, defendant's agent informed the driver that plaintiff was to stop at the station designated. Held, sufficient to establish, *prima facie*, the allegation of a contract to safely carry (Thorne v. California Stage Co., 6 Cal. 232). And see § 490, *post*.

⁴ The plaintiff purchased a through ticket, and having stopped at a way station, afterward got into a caboose car which was attached to a freight train, and on which passengers frequently rode, and the conductor suffered him to remain. Held, that he must be conclusively presumed to be lawfully on the train (Edgerton v. Harlem R. Co., 35 Barb. 193, 389: *aff'd*, 39 N. Y. 227). See Russ v. War Eagle, 14 Iowa, 363.

⁵ A carrier's liability for injury to a person who, having a ticket, safely boards its moving train, is the same as its liability to any passenger (Sharrer v. Paxson, 171 Pa. St. 26; 33 Atl. 120 [pushed off moving train]). See cases cited under § 493, *post*. One who purchases a ticket which de-

fendant was accustomed to accept on its trains as if issued by it, and enters a car is not a trespasser (Ham v. Delaware, etc. Canal Co., 142 Pa. St. 617; 21 Atl. 1012).

⁶ Thus a newsboy, jumping on a horse-car to sell papers, was held not to be a passenger, as he did not expect to pay fare and was not transported from one place to another, but simply had a license to pass on and off the car for the purpose of selling papers (Fleming v. Brooklyn R. Co., 1 Abb. N. C. 433; *aff'd*, without opinion, 74 N. Y. 618; Blackmore v. Toronto R. Co., 38 Upp. Can. [Q. B.] 172). But a child nine years of age who was carried several blocks on a street-car, the driver and conductor knowing him to be on board, was held a passenger, whether he intended to pay fare or not (Metropolitan R. Co. v. Moore, 83 Ga. 453; 10 S. E. 730). And so where a boy ten years old entered a street-car on the invitation of its conductor, and was thrown from the front platform by the carelessness of the driver (New Jersey Traction Co. v. Danbech, 57 N. J. Law, 463; 31 Atl. 1038).

son who proceeds as soon as possible to make his way to the vehicle, certainly gives him all the rights of a passenger.⁷ But it is not necessary that a traveler should have actually paid any fare,⁸ or have expressly agreed to pay it⁹ or even intend to pay it,¹⁰ in order to entitle him to the rights of a passenger. It is sufficient, if he puts himself in such a position as to give the carrier a legal right to demand whatever fare may be due, and has committed no fraudulent act by which the carrier has been prevented from knowing his presence or his liability, if any, to pay.¹¹ Thus, a traveler who enters a train by mistake, supposing it to belong to a company to which he has paid fare, and therefore not intending to pay again, is nevertheless entitled to all the rights of a passenger, even while getting off without offering to pay fare.¹² Where the rules of a carrier require passengers to purchase tickets before entering the vehicle, a person traveling without a ticket, but with no intent to defraud the carrier, is nevertheless a passenger, and entitled to all rights as such,¹³ especially if he is upon the train by the

⁷ *Warren v. Fitchburg R. Co.*, 8 Allen, 227. The contract created between a railroad company and a purchaser of one of its tickets, and the rights and liabilities of the parties to such a contract, are the same, whether the ticket was purchased at one of the company's stations or at the station of a contiguous railroad, or of any other authorized agent of the company (*Schopman v. Boston, etc. R. Co.*, 9 Cush. 24; *Central R., etc. Co. v. Perry*, 58 Ga. 461).

⁸ *Ellsworth v. Chicago, etc. R. Co.*, 91 Iowa, 586; 63 N. W. 584 [ticket bought on credit].

⁹ One who enters a steamboat, with intent to travel on it, from that moment, though he has not paid his fare, occupies the character and relation of a passenger (*Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306). One in good faith coming to the depot to take passage on the cars is a passenger, though he have not bought a ticket (*Grimes v. Pennsylvania Co.*, 36 Fed. 72).

¹⁰ Where plaintiff had no pass and had money to pay her fare, but was not asked for it, the fact that she hoped to be allowed to travel free is of no importance (*Morris v. N. Y., Ontario, etc. R. Co.*, 73 Hun, 560; 26 N. Y. Supp. 342).

¹¹ A person who enters a train with the honest purpose of securing the right to ride thereon is a passenger (*Cross v. Kansas City, etc. R. Co.*, 56 Mo. App. 664).

¹² A railroad company owes to one on its train by mistake, and who has not paid his fare, the same duty of protection against negligence as to other passengers (*Lewis v. Delaware, etc. Canal Co.*, 145 N. Y. 508; 40 N. E. 248; *Cincinnati, etc. R. Co. v. Carper*, 112 Ind. 26; 13 N. E. 122; 14 Id. 352; *Columbus, etc. R. Co. v. Powell*, 40 Ind. 37).

¹³ *Norfolk, etc. R. Co. v. Grose-close*, 88 Va. 267; 13 S. E. 454; *Hamilton v. Caledonian R. Co.*, 19 Sc. Sess. Cas. [2d ser.] 457; *Doran v. East River Ferry Co.*, 3 Lans. 105.

express permission of the company's servants, and means to pay his fare.¹⁴ So one who uses a ticket bearing the name of another person, and by its terms not transferable, is, notwithstanding, entitled to the rights of a passenger, if he was received with a knowledge of the facts, and under circumstances showing that no fraud was intended;¹⁵ though it is otherwise if he purposely allows himself to be mistaken for the person to whom the ticket was issued.¹⁶ One who rides upon a train from which the general rules of the company exclude passengers, paying his fare to the conductor, and not receiving any directions to leave, is a lawful passenger on such train.¹⁷ The question, whether one is a passenger or not, is one of mixed law and fact; but the law being tolerably clear, it may be said, as a general rule, that the issue, upon any conflict of evidence, is for the jury.¹⁸ A person actually traveling on a passenger vehicle, and not connected with the service of the carrier, is presumed to be a passenger and traveling for a consideration.¹⁹

§ 489. Who are not passengers. — A person who, having no other lawful right to be upon the vehicle, is there without the consent of the carrier,¹ has none of the rights peculiar to

One who in good faith boards a passenger train without a ticket, intending to pay his fare to the conductor, becomes a passenger (*Houston, etc. R. Co. v. Washington* [Tex. Civ. App.], 30 S. W. 719). Where a railroad has failed to furnish a traveler the opportunity to procure a ticket and he enters the train without having such ticket, but offers to pay the regular fare, it cannot lawfully eject him (*Poole v. Northern Pac. R. Co.*, 16 Oreg. 261; 19 Pac. 107).

¹⁴ *Stockdale v. Lancashire, etc. R. Co.* [Exch.], 11 Weekly Rep. 650.

¹⁵ *Great Northern R. Co. v. Harrison*, 10 Exch 376; *Robostelli v. N. Y., New Haven, etc. R. Co.*, 33 Fed. 796.

¹⁶ Plaintiff was traveling on a mileage ticket, made out in the name of one F., and, by a statement printed

on the ticket, it was not transferable. While so riding on the train, he was injured by defendant's negligence in making a coupling. Held, the relation of carrier and passenger did not exist (*Way v. Chicago, etc. R. Co.*, 64 Iowa, 48).

¹⁷ *Dunn v. Grand Trunk R. Co.*, 58 Me. 187; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239. See *Gradin v. St. Paul, etc. R. Co.*, 30 Minn. 217.

¹⁸ *Meyer v. Second Ave. R. Co.*, 8 Bosw. 305.

¹⁹ *Creed v. Pennsylvania R. Co.*, 85 Pa. St. 139; *Louisville, etc. R. Co. v. Thompson*, 107 Ind. 443; 9 N. E. 357; *Bryant v. Chicago, etc. R. Co.*, 4 C. C. A. 146; 53 Fed. 997.

¹ For cases in which it was held that the servants giving consent had no power to do so, see *Cooper v. Lake Erie, etc. R. Co.*, 136 Ind. 366;

passengers, and cannot recover damages for anything short of such negligence on the part of the carrier, occurring after notice of such person's presence, as would give a right of recovery to any other trespasser.² Therefore one who, by collusion with a servant of the carrier, rides without intending to pay fare,³ especially if upon a vehicle from which, as he knows,

36 N. E. 272 [working passage], and *Finley v. Hudson R. Co.*, 64 Hun, 373; 19 N. Y. Supp. 621 [similar case]. A railroad engineer has ordinarily no authority to create passenger relations (*Ohio, etc. R. Co. v. Allender*, 59 Ill. App. 620). See also *Evansville, etc. R. Co. v. Barnes*, 137 Ind. 306; 36 N. E. 1092 [invitation as employee, not passenger].

² One who fraudulently evades the payment of his fare on a train is not a passenger, and the company owes him no duty, except to abstain from willful or reckless injury to him (*Condran v. Chicago, etc. R. Co.*, 14 C. C. A. 506; 67 Fed. 522). S. P., as to boys, jumping on, who did not intend to pay fare, *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332; 2 S. W. 315; *State v. Baltimore, etc. R. Co.*, 24 Md. 84 [boys climbing upon rear car of freight train]; *Ecliff v. Wabash, etc. R. Co.*, 64 Mich. 196; 31 N. W. 180 [boy got on front of engine]. S. P., as to one needlessly assisting a passenger to a seat, *Lawton v. Little Rock, etc. R. Co.*, 55 Ark. 428; 18 S. W. 543 [but *query?*]. In *Moss v. Johnson* (22 Ill. 633) it was said that a trespasser could not recover for any injury. But this, of course, is not the law (§§ 97, 98, *ante*). Where plaintiff was injured through the gross negligence of defendant's trainmen, who had knowledge that he was on the train, defendant is liable even if plaintiff was a trespasser (*Everett v. Oregon, etc. R. Co.*, 9 Utah, 340; 34 Pac. 289). A carrier does not owe to a

person riding without payment of fare that degree of care that is due to a passenger, but is liable only for ordinary negligence (*Kansas City, etc. R. Co. v. Berry*, 53 Kans. 112; 36 Pac. 53). Company liable for injury to a trespasser forcibly ejected by brakeman from train while in rapid motion (*St. Louis, etc. R. Co. v. Reagan*, 52 Ill. App. 488). See also *Vertrees v. Newport, etc. R. Co.*, 95 Ky. 314; 25 S. W. 1; *Houston v. Bolling*, 59 Ark. 395; 27 S. W. 492. Where a child of seven years climbed upon the front platform of a horse-car by invitation of the driver, without payment of fare, and fell off by his starting too suddenly, the carrier was held to be liable (*Wilton v. Middlesex R. Co.*, 107 Mass. 108). Where a conductor, by a sudden gesture and ejaculation, frightens a boy of ten years, who is stealing a ride on the platform, and thereby causes him to fall from the car while it is in motion, the company is liable (*Ansteth v. Buffalo R. Co.*, 145 N. Y. 210; 39 N. E. 708). A drover, whose cattle were on a train, was himself injured by reason of a misplaced switch while riding on the engine. Held, that, although not a passenger, he was entitled to maintain an action if he was there with the permission, express or implied, of the company's servants (*Waterbury v. N. Y. Central R. Co.*, 17 Fed. 671).

³ *McVeety v. St. Paul, etc. R. Co.*, 45 Minn. 268; 47 N. W. 809 [consent of conductor]; *Williams v. Mobile, etc. R. Co.* [Miss.], 19 So. 90

passengers are excluded,⁴ is not a passenger; and taking passage on a freight train, without the consent of the company, even with the intention to pay fare, does not bring a person into contract relation with the company, so as to make it liable to him as a passenger.⁵ One who, without the carrier's consent, attempts to enter the vehicle at a place not proper for entry is not a passenger while so doing.⁶

§ 490. When relation begins and ends. — It is not necessary, in order to create the relation of carrier and passenger, that the passenger should have actually entered the vehicle, much less that the vehicle should have started on the journey with him. The relation begins, as soon as one, intending in good faith to become a passenger, enters in a lawful manner upon the carrier's premises to engage passage; and the carrier's responsibility dates from that time.¹ Much more is it clear

[riding for less than regular fare by conductor's consent]. Riding on locomotive, by agreement with fireman to shovel coal for privilege of riding, without knowledge of conductor (*Woolsey v. Chicago, etc., R. Co.*, 39 Neb. 798; 58 N. W. 444). See *Chicago, etc. R. Co. v. Bryant*, 65 Fed. 969; 13 C. C. A. 249 [yardmaster, giving free trip]; *Atchison, etc. R. Co. v. Johnson*, 3 Okl. 41; 41 Pac. 641 [payment to brakeman].

⁴ *Toledo, etc. R. Co. v. Brooks*, 81 Ill. 245.

⁵ *Gardner v. New Haven, etc. Co.*, 51 Conn. 143.

⁶ One who has paid no fare, and, without the knowledge of those in charge, attempts to get on a car at a place where the railroad company is not accustomed to receive passengers, is not a passenger, and the company is not liable for injuries in the attempt to board the train (*Haase v. Oregon R. Co.*, 19 Oreg. 354; 24 Pac. 238; *Phillips v. Northern R. Co.*, 62 Hun, 233; 16 N. Y. Supp. 909). A charge declaring one to be a passenger who attempted to get on a

car, with the intention of paying his fare when called upon, without qualification as to the time, place, or manner of such attempt, is erroneous (*Schaefer v. St. Louis, etc. R. Co.*, 128 Mo. 64; 30 S. W. 331).

¹ *Gilmore v. Philadelphia, etc., R. Co.*, 154 Pa. St. 375; 25 Atl. 774 [going in to buy ticket]; *Grimes v. Pennsylvania Co.*, 36 Fed. 72 [in station awaiting train for reasonable time]; *St. Louis, etc. R. Co. v. Griffith*, 12 Tex. Civ. App. 631; 35 S. W. 741 [waiting ten hours in station for connecting train]. But he must remain only to take the carrier's vehicle, not some other unconnected therewith (*Heinlein v. Boston, etc. R. Co.*, 147 Mass. 136; 16 N. E. 698). A man walking towards a station with the intention of buying a ticket and taking a train is not a passenger before he reaches the station (*June v. Boston & A. R. Co.*, 153 Mass. 79; 26 N. E. 238). See § 492*a*, *post*. A person who gets upon a railroad train while it is in motion at a dangerous speed, does not "lawfully" enter, and so does not

that this is the case, after the passenger has bought a ticket, although he has not entered the vehicle.² A passenger acquires full rights by entering a car, before the train is made up,³ or at any point on the journey where the carrier accepts passengers.⁴ Where it is the practice of the carrier to stop for passengers when hailed, the fact that he stops for a person hailing him is sufficient evidence that he accepts such person as a passenger; and from that moment the relation begins.⁵

become a "passenger," within the purview of the Massachusetts statutes, until he reaches a safe place within the car intended for him (*Merrill v. Eastern R. Co.*, 139 Mass. 238).

² Plaintiff had bought a ticket at defendant's station where there was a double track, for a train which was to pass on the further track. While crossing the nearer track in order to enter the train, he was struck by another train, coming from the opposite direction. Held, that he was entitled to all the rights of a passenger, and that the railway company was liable (*Warren v. Fitchburg R. Co.*, 8 Allen, 227). *s. p.*, *Beard v. Connecticut, etc. R. Co.*, 48 Vt. 101; *Sonier v. Boston, etc. R. Co.*, 141 Mass. 10; 6 N. E. 84; *Klien v. Jewett*, 26 N. J. Eq. 474; *Terry v. Jewett*, 17 Hun, 395; *Gaynor v. Old Colony, etc. R. Co.*, 100 Mass. 208. A railroad company is responsible for injuries received by a passenger seeking to board one of its trains at night, who finds no one to inform him how to reach the sleeping-car attached to the train, which is left standing outside of the yard and to which a sidewalk laid by the company leads in a direct route, which the passenger follows, and from which he falls by reason of insufficient light (*Moses v. Louisville, etc. R. Co.*, 39 La. Ann. 649; 2 So. 567). The slightest entry into the vehicle is clearly sufficient (*Cleveland v. N.*

J. Steamboat Co., 68 N. Y. 306). *s. p.*, *West Chicago R. Co. v. Craig*, 57 Ill. App. 411 [entering car]. One who goes upon the gangplank of a steamboat for the purpose of taking passage thereon is a passenger (*Rogers v. Kennebec Steamboat Co.*, 86 Me. 261; 29 Atl. 1069).

³ *Hannibal, etc. R. Co. v. Martin*, 111 Ill. 219 [train not made up]; *Missouri, etc. R. Co. v. Simmons*, [Tex. Civ. App.], 33 S. W. 1096 [train not drawn up to the station platform]; *Western Maryland R. Co. v. Herold*, 74 Md. 510; 22 Atl. 323 [detached car; unknown rules of exclusion immaterial].

⁴ *Dewire v. Boston, etc. R. Co.*, 148 Mass. 348; 19 N. E. 523 [no station].

⁵ Plaintiff held up his finger to the driver of the omnibus, who stopped to take him up, and just as the plaintiff was putting his foot on the step the driver drove on, and the plaintiff fell. Held, that stopping the omnibus implied a consent to take plaintiff as a passenger (*Brien v. Bennett*, 8 Carr. & P. 724). *s. p.*, as to a horse-car (*Smith v. St. Paul R. Co.*, 32 Minn. 1). If the driver of a car recognizes a signal given by a person wishing to ride upon the car, and holds it for him to enter, the instant he places his foot on the steps, he becomes a passenger (*Ganiard v. Rochester, etc. R. Co.*, 50 Hun, 22; 2 N. Y. Supp. 470). But the facts that plaintiff signalled defendant's street

It is well settled that these responsibilities exist, where the passenger suffers injury while being transferred from one vehicle or train to another in the course of a journey,⁶ or while quitting the vehicle for any lawful purpose, before completing the journey, but remaining on the carrier's premises.⁷ But the rule cannot be confined to these cases. Much more does it continue while passengers are leaving the carrier's premises, at their final destination.⁸ It ceases after they have been made aware of their arrival at the place of destination, and have had a reasonable time to get off the vehicle⁹ and to leave the

car to stop for her to get on board, and that the driver intended to stop the car for that purpose, are not sufficient to establish the relation of carrier and passenger (*Donovan v. Hartford R. Co.*, 65 Conn. 201; 32 Atl. 350). *s. P.*, *Schepers v. Union Depot R. Co.*, 126 Mo. 665; 29 S. W. 712.

⁶ Where transfers are made from one car to another, as part of the journey, the carrier's liability continues through the transfer (*Baldwin v. Fairhaven, etc. R. Co.*, 68 Conn. 567; 37 Atl. 418); and if required to cross over several tracks he is not bound to stop, look and listen before crossing (*Baltimore, etc. R. Co. v. State*, 60 Md. 449). A railroad company, taking its passengers to or from its station by other means than its railroad, is answerable for any negligence in so doing, as much as if the journey were made upon its road (*Buffit v. Troy, etc. R. Co.*, 36 Barb. 420; *aff'd*, 40 N. Y. 168). A train having come upon another wrecked train on a dark night, transferred its passengers to a train beyond the wreck, to reach which they had to cross a deep ditch. A plank was placed across it, but no light was stationed near it, and no warning of it given to the passengers. Plaintiff fell into it and broke his leg. Held, such negligence as rendered

the company liable (*Vicksburg, etc. R. Co. v. Howe*, 52 Miss. 202).

⁷ A passenger on a railroad does not lose his character as such by alighting from the cars at a regular station, although he has not yet arrived at the terminus of his journey (*Parsons v. N. Y. Central R. Co.*, 113 N. Y. 355; 21 N. E. 145 [practically overruling *State v. Grand Trunk R. Co.*, 58 Me. 176]; *Dodge v. Boston, etc. S. S. Co.*, 148 Mass. 207; 19 N. E. 373 [passenger entitled to protection during egress from boat to get breakfast]). The relation exists until the passenger has left the carrier's grounds (*Pittsburgh, etc. R. Co. v. Martin*, 2 Ohio N. P. 353 [run over by engine]).

⁸ *Dwinelle v. N. Y. Central R. Co.*, 120 N. Y. 117; 24 N. E. 319; *Armstrong v. N. Y. Central R. Co.*, 66 Barb. 437; *aff'd*, 64 N. Y. 635; *Gaynor v. Old Colony, etc. R. Co.*, 100 Mass. 208; *Dodge v. Boston, etc. St. Co.*, 148 Id. 207; 19 N. E. 373; *Orcutt v. Northern Pac. R. Co.*, 45 Minn. 368; 47 N. W. 1068.

⁹ *Imhoff v. Chicago, etc. R. Co.*, 20 Wisc. 344; *Illinois Central R. Co. v. Slatton*, 54 Ill. 133. A passenger on a street-car, who steps from the car into a public street, ceases to be a passenger the moment he leaves the car (*Creamer v. West End R. Co.*, 156 Mass. 320; 31 N. E. 391).

premises of the carrier, but not until then. It continues, for example, while a passenger by a train is walking along the station platform, without unreasonable delay, though it be his intention to leave the platform at a point where he will become a trespasser.¹⁰

§ 491. Liability to free passengers. — It is well settled that, in the absence of a special contract, a passenger traveling gratuitously has a perfect right of action for injuries suffered by him through the carrier's negligence.¹ The fact that a traveler who ought to pay has not paid, and does not intend to pay, his fare, does not, in the absence of actual fraud, deprive him of redress for injuries.² There is no practical difference between the degree of care which a free passenger has a right to claim, and that to which a paying passenger is entitled.

The relation of a person to a railroad company as passenger ceases when he voluntarily leaves its train at a place not designed for the discharge of passengers (*Buckley v. Old Colony R. Co.*, 161 Mass. 26; 36 N. E. 583). *s. p.*, *Pittsburgh, etc. R. Co., v. Krouse*, 30 Ohio St. 222; *Finnegan v. Chicago, etc. R. Co.*, 48 Minn. 378; 51 N. W. 122 [plaintiff, being on wrong train, and let off, walked on track and was injured]. One who remained on a train a half hour after reaching his destination, it being the terminus of the road, held not to be, after that time, a passenger (*Chicago, etc. R. Co. v. Frazer*, 55 Kans. 582; 40 Pac. 923). Compare *Chicago, etc. R. Co. v. Bell*, 1 Kans. App. 71; 41 Pac. 209.

¹⁰ *Keefe v. Boston, etc. R. Co.*, 142 Mass. 251.

¹ *Perkins v. N. Y. Central R. Co.*, 24 N. Y. 106; *Nolton v. Western R. Co.*, 15 Id., 444; *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478; 20 N. E. 103; *Todd v. Old Colony, etc. R. Co.*, 3 Allen, 18; *Great Northern R. Co. v. Harrison*, 10 Exch. 376; *Philadel-*

phia, etc. R. Co. v. Derby, 14 How. U. S. 468; *Gillenwater v. Madison, etc. R. Co.*, 5 Ind. 339; *Hurt v. Southern R. Co.*, 40 Miss. 391; *Benner Livery, etc. Co. v. Busson*, 58 Ill. App. 17. See *Denver, etc. Tr. Co. v. Dwyer*, 20 Colo. 132; 36 Pac. 1106.

² *Doran v. East River Ferry Co.*, 3 Lans. 105; *Wilton v. Middlesex R. Co.*, 107 Mass. 108. A mother, carrying in her arms a child over three years old, for which half fare was chargeable, did not take a ticket for the child. At the time his mother took her ticket, no question was asked as to the age of the child, and there was no intention on her part to defraud the company. Held, that the child was entitled to recover against the company for injuries as a passenger (*Austin v. Great Western R. Co.*, L. R. 2 Q. B. 412). Where a woman was injured in getting aboard of a steamer by falling off from an improper gangplank; held, that her unwillingness to pay fare because of such injury, and the fact that the captain made no demand of fare, was no release of her right

§ 492. **Who are not free passengers.** — A person who receives a free pass, as part of a transaction beneficial to the carrier, is not a merely gratuitous passenger. Thus, a drover who receives a pass to travel with cattle on which he pays freight, is not.¹ Neither is the messenger of an express company, traveling in charge of its freight, on a free pass over a railroad carrying such freight,² nor a mail agent, in charge of the mail,³ nor a porter in a parlor car.⁴

of action against the owners, unless she, at the time, understood and consented that it should be so; and this, though the passage was two and a half days long (*Union Packet Co. v. Clough*, 20 Wall. 528).

¹ *N. Y. Central R. Co. v. Lockwood*, 17 Wall. 357; *Poucher v. N. Y. Central R. Co.*, 49 N. Y. 263; *Bissell v. N. Y. Central R. Co.*, 25 Id. 442; *Porter v. N. Y., Lake Erie, etc. R. Co.*, 59 Hun, 177, 13 N. Y. Supp. 491; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Cleveland, etc. R. Co. v. Curran*, 19 Ohio St. 1; *Tibby v. Mo. Pacific R. Co.*, 82 Mo. 292; *Ohio, etc. R. Co. v. Selby*, 47 Ind. 471; *Indianapolis, etc. R. Co. v. Beaver*, 41 Id. 493; *Lawson v. Chicago, etc. R. Co.*, 64 Wisc. 447; 24 N. W. 618; *Little Rock, etc. R. Co. v. Miles*, 40 Ark. 298; *Nurse v. St. Louis, etc. R. Co.*, 61 Mo. App. 67; *Missouri, etc. R. Co. v. Cook*, 12 Tex. Civ. App. 208; 33 S. W. 669; *Saunders v. Southern Pac. Co.*, 13 Utah, 275; 44 Pac. 932; *Delaware, etc. R. Co. v. Ashley*, 67 Fed. 209; 14 C. C. A. 368 [right on connecting road]. He is not, while accompanying his stock, entitled to *all* the rights and privileges of an ordinary passenger for hire (*Omaha, etc. R. Co. v. Crow*, 47 Neb. 84; 66 N. W. 21). See *Richmond, etc. R. Co. v. Burnsed*, 70 Miss. 437; 12 So. 958.

² *Blair v. Erie R. Co.*, 66 N. Y. 313; *Brewer v. N. Y., Lake Erie, etc. R. Co.*, 124 Id. 59; 26 N. E. 324; *Kenney*

v. N. Y. Central R. Co., 125 N. Y. 426; 26 N. E. 626; *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Fordyce v. Jackson*, 56 Ark. 594; 20 S. W. 528, 597; *San Antonio, etc. R. Co. v. Adams*, 6 Tex. Civ. App. 102; 24 S. W. 839.

³ *Seybolt v. N. Y., Lake Erie, etc. R. Co.*, 95 N. Y. 562; *Nolton v. Western R. Co.*, 15 Id. 444; *Collett v. London, etc. R. Co.*, 16 Q. B. 984; *Cleveland, etc. R. Co. v. Ketcham*, 133 Ind. 346; 33 N. E. 116; *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455; 14 S. W. 758; 16 Id. 849; *Magoffin v. Missouri Pac. R. Co.*, 102 Mo. 540; *Gulf, etc. R. Co. v. Wilson*, 79 Tex. 371; 15 S. W. 280; *Yeomans v. Contra Costa Nav. Co.*, 44 Cal. 71; *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 165. See note 2, § 488, *ante*.

⁴ *Jones v. St. Louis, etc. R. Co.*, 125 Mo. 666; 28 S. W. 883. s. p., *Union Pac. R. Co. v. Nichols*, 8 Kans. 505 [barkeeper on steamboat]; *Commonwealth v. Vermont, etc. R. Co.*, 108 Mass. 7 [one paying for privilege of selling lunches to passengers]. As to newsboys, see *Phila. Tr. Co. v. Orbann*, 119 Pa. St. 37; 12 Atl. 816 [permitted by conductor to enter car to sell papers]; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210; *Fleming v. East Brooklyn R. Co.*, 1 Abb. N. C. 433; *Williams v. Pullman Car Co.*, 40 La. Ann. 87; 4 So. 85; *Northwestern R. Co. v. Hack*, 66 Ill. 239;

§ 492a. **Quasi passengers.** — A common carrier, by the very nature of his employment, invites the public to enter upon his vehicles; and he is bound to protect not only persons who have made an express contract with him, or who enter his premises with the fixed purpose of making such a contract, but also, in our opinion, those who enter in good faith for the purpose of examining his accommodations or inquiring into his terms, or seeking information as to the time of departure and arrival of trains, with a view to making the journey, at any future time, if satisfied on these points.¹ It has been very properly adjudged that this right of entry and protection is due to one employed by an intending passenger to carry him to the station and assist him in getting on the train,² and also to friends attending on the arrival or departure of trains to speed departing, or to welcome arriving, passengers.³ One having charge of an invalid, or lady and children, intending to go by train, may enter a car, as of right, to assist them to seats, and is entitled to have sufficient time, after doing so, to leave the

Blackmore v. Toronto R. Co., 38 Upp. Can. [Q. B.] 172.

¹ *Bradford v. Boston, etc. R. Co.*, 160 Mass. 392; 35 N. E. 1311 [going to depot for a time-table]. "It is a part of the contract by which railroad companies hold their charters that the public are to have the right to enter upon the premises acquired under their charters for the purpose of being carried on their roads, and this is a right which the company cannot revoke or refuse to permit the exercise of" (*Harris v. Stevens*, 31 Vt. 79).

² *Tobin v. Portland, etc. R. Co.* 59 Me. 183 [hack driver carrying passenger to station injured by defect in platform]. *s. p.*, *Campbell v. Portland Sugar Co.*, 62 Me. 552 [defect in private pier; truckman injured]; *Toledo, etc. R. Co. v. Grush*, 67 Ill. 262 [servant of consignee of freight waiting its arrival; defect in station platform].

³ *Lucas v. New Bedford R. Co.*, 6

Gray, 64; *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *Langan v. Iron, etc. R. Co.*, 72 Mo. 392 [friend going with passenger and carrying his trunk, struck by projecting bumper of a train from behind: question of negligence for jury]. A railroad company is liable to one who comes to the depot to meet friends, for failure to keep the station platform in a reasonably safe condition and reasonably well-lighted (*N. Y., Chicago, etc. R. Co. v. Mushrush*, 11 Ind. App. 192; 37 N. E. 954; 38 Id. 871; *Cherokee Packet Co. v. Hilson*, 95 Tenn. 1; 31 S. W. 737; *Hamilton v. Texas, etc. R. Co.*, 64 Tex. 251; *Texas, etc. R. Co. v. Best*, 66 Id. 116; 18 S. W. 224 [plaintiff entered premises on an appointment with one supposed to be a passenger on incoming train with a view of becoming a passenger himself if the appointment was met; defective platform; defendant liable]).

train before it starts.⁴ In the absence, however, of any knowledge on the part of the carrier's servants of his presence, or any custom of giving notice or signaling the departure of trains for the benefit of those desiring to get off before a train starts, he cannot complain if it starts before he can make known his wish to get off, but must remain or take the risk of alighting while the train is in motion.⁵ Otherwise, if a notice of a train's starting was customary and the visitor relied upon its being given,⁶ or the conductor either knew or should have known of his presence,⁷ or his failure to alight in time was due to a locked door.⁸ A railroad company owes no duty with respect to the safety of its depot platforms and waiting-rooms to others than those who enter them intending to become passengers, or to seek information as to train-time, etc., or to meet or assist departing or arriving friends, and, therefore, is not liable to one who visits its premises out of idle curiosity.⁹

⁴ Doss v. Missouri, etc. R. Co., 59 Mo. 27 and cases *infra*.

⁵ Coloman v. Georgia R. Co., 84 Ga. 1; 10 S. E. 498 [limiting Stiles v. West Point, etc. R. Co., 65 Ga. 375]; McLaren v. Atlantic, etc. R. Co., 85 Ga. 504; 11 S. E. 840; Central R. Co. v. Letcher, 69 Ala. 106; Griswold v. Chicago, etc. R. Co., 64 Wisc. 652; 26 N. W. 101; Dillingham v. Pierce [Tex. Civ. App.], 31 S. W. 203. It is not negligence for a carrier to start its train at a station before a person who has assisted a passenger on board has had time to get off, unless it has notice of his intention to get off (Yarnell v. Kansas City R. Co., 113 Mo. 570; 21 S. W. 1; Missouri, etc. R. Co. v. Miller, 8 Tex. Civ. App. 241; 27 S. W. 905; Texas, etc. R. Co. v. McGilvary [Tex. Civ. App.], 29 S. W. 67). He cannot demand that the train be held for the full length of time usually required for passengers to get on or off at that place, but only that it be held long enough for him to get off, upon notice to the trainmen that he desires to do

so (Little Rock, etc. R. Co. v. Lawton, 55 Ark. 428; 18 S. W. 543).

⁶ Doss v. Missouri, etc. R. Co., *supra*; Suber v. Georgia, etc. R. Co., 96 Ga. 42; 23 S. E. 387 [train started without customary signal or warning].

⁷ Louisville, etc. R. Co. v. Crunk, 119 Ind. 542; 21 N. E. 31 [invalid passenger went on car by aid of attendants]; Rott v. Forty-second St. Ferry Co., 56 N. Y. Superior, 151; Houston v. Gate City R. Co., 89 Ga. 272; 15 S. E. 323 [evidence that custodian of child put on street car was known by driver not to intend to remain, admissible].

⁸ Galloway v. Chicago, etc. R. Co., 87 Iowa, 458; 54 N. W. 447.

⁹ Gillis v. Pennsylvania Co., 59 Pa. St. 129. A mere spectator on a platform can only recover for an injury from a defect therein in case of gross and wanton negligence equivalent to intentional mischief (Burbank v. Illinois Cent., 42 La. Ann. 1156; 8 So. 580 [flooring of platform had been taken up for repairs and was not lighted]).

Even an intending passenger is entitled to protection for a reasonable time only before the departure of his train.¹⁰ If he remains on the premises after the departure of the last train for the day, he is at most a licensee only.¹¹

§ 493. Ejection of passengers.— If a passenger refuses to pay his lawful fare,¹ or to give proper evidence that he has

¹⁰ An intending passenger's right of entry is to be exercised in a reasonable manner, within a reasonable time of the arrival or departure of trains. A complaint for ejection from depot held bad, on demurrer, for not alleging plaintiff's intention to take the next train after entering depot (*Harris v. Stevens*, 31 Vt. 79).

¹¹ In *Heinlein v. Boston & Provid. R. Co.* (147 Mass. 136), an intending passenger learning, on entering the station, that the last train for the day had gone, remained in the waiting-room for "three or four minutes or something like that" for a horse-car to come along, during which time the station was closed, at the usual hour, and the lights put out. Held, that after being informed of the departure of the last train, and after having had ample time to leave the station, he was a mere licensee with none of the rights of an intending passenger, and could not complain of the absence of lights in his efforts to get out. But in *N. Y., Chicago, etc. R. Co. v. Musbrush* (11 Ind. App. 192; 37 N. E. 954; 38 Id. 871), held that a boy sent to a station to meet a relative is not necessarily a trespasser because he fails to immediately leave the platform after the arrival of the train, and take the shortest route home. See cases cited in note 1, § 490, *ante*.

¹ *Westchester R. Co. v. Miles*, 55 Pa. St. 209; *Moore v. Columbia, etc. R. Co.*, 38 S. C. 1; 16 S. E. 781; *Wardwell v. Chicago, etc. R. Co.*, 46 Minn. 514; 49 N. W. 206; *Pea-*

body v. Oregon R., etc. Co., 21 Oreg. 121; 26 Pac. 1053. A railway passenger carried beyond the point of destination without any fault of the carrier must pay fare to the next station or suffer ejection (*Scott v. Cleveland, etc. R. Co.*, 144 Ind. 125; 43 N. E. 133; *Texas, etc. R. Co. v. James*, 82 Tex. 306; 18 S. W. 589; [passenger asleep]). Otherwise, if his being carried past his destination was carrier's fault (*Dave v. Morgan's La. R. Co.*, 47 La. Ann. 576; 17 So. 128). A passenger who has a ticket entitling him to ride to his destination from a station not yet reached, may be ejected on refusal to pay fare from the point where he boarded the train to the station designated in the ticket as the starting place (*Chicago, etc. R. Co. v. Adams*, 60 Ill. App. 571). He may be ejected, if he refuses to pay, otherwise than by a ticket not good for that train (*Thorp v. Concord R. Co.*, 61 Vt. 378; 17 Atl. 791), or good only for a shorter route (*Church v. Chicago, etc. R. Co.*, 6 S. D. 235; 60 N. W. 854), or by an expired or void ticket (*Moore v. Ohio River R. Co.*, 41 W. Va. 160; 23 S. E. 539; *McGhee v. Drisdale*, 111 Ala. 597; 20 So. 391), or fare, in addition to his ticket, to the first place at which the train stops (*Atchison, etc. R. Co. v. Gants*, 38 Kan. 608; 17 Pac. 54), or for refusing to pay the lawful extra charge for train fare (*Lake Erie, etc. R. Co. v. Mays*, 4 Ind. App. 413; 30 N. E. 1106; *Easton v. Waters*, 4 Tex. 111; 16 S. W. 540; *Ellsworth v. Chicago, etc.*

paid it,² he may be ejected from the vehicle, or other premises. Where the passenger has in fact paid his fare³ and given up his ticket,⁴ or is willing and offers to pay,⁵ within a reasonable time,⁶ or if any one offers to pay for

R. Co., 95 Iowa, 98; 63 N. W. 584). As to when extra train fare cannot be required, see *Cleveland, etc. R. Co. v. Beckett*, 11 Ind. App. 547; 39 N. E. 429 [ticket refused]; *Missouri Pac. R. v. McClanahan*, 66 Tex. 530; 1 S. W. 576 [office not open]; *Eddy v. Rider*, 79 Tex. 53; 15 S. W. 113 [same]; *Louisville, etc. R. Co. v. Wade* [Ky.], 12 S. W. 275. So a passenger, entering a parlor or chair car, who declines to pay proper extra charge, cannot complain if removed to the first-class car without force (*St. Louis, etc. R. Co. v. Hardy*, 55 Ark. 134; 17 S. W. 711). It is not necessary that a passenger on a street car should tender the exact amount of his fare, but he must tender a reasonable amount, and the carrier must furnish change, and five dollars is such a reasonable amount (*Barrett v. Market St. R. Co.*, 81 Cal. 296; 22 Pac. 859). A genuine silver coin, worn smooth by use, not appreciably diminished in weight, and distinguishable, is a legal tender for car fare (*Jersey City, etc. R. Co. v. Morgan*, 52 N. J. Law, 60; 18 Atl. 904).

² A passenger who has given up his ticket, but who, at an intermediate station, changes his seat, cannot recover for being ejected on his refusal to pay when fare was afterwards demanded; he having refused to give any explanation (*White v. Grand Rapids, etc. R. Co.*, Mich.

; 65 N. W. 521). If a passenger has lost his ticket, the legal fare may be exacted from him; and the conductor is not bound to investigate the excuse of the passenger for its nonproduction, and determine

whether it is made in good faith or not (*Rogers v. Atlantic City R. Co.*, 57 N. J. Law, 703; 34 Atl. 11). Though the conductor honestly believed the passenger had not paid his fare, when in fact he had, and the passenger makes no effort to show that he had paid, and was immediately taken back on the train, the company held liable for expulsion (*Gulf, etc. R. Co. v. Barnett*, 12 Tex. Civ. App. 321; 34 S. W. 449). See also *Eddy v. Elliot* [Tex.], 15 S. W. 41.

³ *Ward v. N. Y. Central R. Co.*, 56 Hun, 268; 9 N. Y. Supp. 377; *Hardy v. N. Y. Central R. Co.*, 58 Hun, 607; 12 N. Y. Supp. 55; *Buck v. Webb*, 58 Hun, 185; 11 N. Y. Supp. 617 [had lost ticket, but presented note of ticket agent to conductor].

⁴ *Townsend v. N. Y. Central R. Co.*, 4 Hun, 217; *Hamilton v. Third Av. R. Co.*, 53 N. Y. 25; *Delaware, etc. R. Co. v. Walsh*, 47 N. J. Law, 548; *St. Louis, etc. R. Co. v. Davis*, 56 Ark. 51; 19 S. W. 107; *Georgia Railroad, etc. Co. v. Eskew*, 86 Ga. 641; 12 S. E. 1061.

⁵ Where a passenger produces a ticket, or stands ready to pay the legal fare, he may recover substantial damages for being evicted (*Zagelmeyer v. Cincinnati, etc. R. Co.*, 102 Mich. 214; 60 N. W. 436). A mere willingness to pay the fare, unaccompanied by any act calculated to suggest such willingness to the conductor, not sufficient to place the conductor in the wrong in ejecting the passenger (*Texas, etc. R. Co. v. James*, 82 Tex. 306; 18 S. W. 589).

⁶ A passenger is entitled to a reasonable time within which to

him,⁷ the carrier is liable for the act of his servants in making such wrongful ejection.⁸ A passenger who wrongfully refuses to pay his legal fare cannot, after the train has been stopped and he has been partially ejected, claim the right to return or remain on payment of fare;⁹ but his persistent refusal to pay, before any act has been done towards ejection, does not deprive him of

find a mislaid ticket (*Chicago, etc. R. Co. v. Willard*, 31 Ill. App. 435 [time between stations reasonable]; *Curl v. Chicago, etc. R. Co.*, 63 Iowa, 417 [reasonable time question for the jury]), and to deposit the fare as security for any time during transit (*Knowles v. Norfolk R. Co.*, 102 N. C. 59; 9 S. E. 7). Upon the conductor demanding his fare, plaintiff told him he would get it if allowed to go into a rear car and see a man who had promised to pay for him. The conductor refused to allow him to do so, and ejected him. Judgment for plaintiff (*Clark v. Wilmington, etc. R. Co.* 91 N. C. 506).

⁷ An actual tender of fare, made before a train is stopped, cannot be refused, no matter who makes the tender (*Ham v. Delaware, etc. Canal Co.*, 142 Pa. St. 617; 21 Atl. 1012).

⁸ The company is liable for the acts of its trainmen in expelling a passenger (*Cain v. Minneapolis, etc. R. Co.*, 39 Minn. 297; 39 N. W. 635), and for the use of excessive force in so doing, if acting in the performance of duty (*Burns v. Glens Falls, etc. R. Co.*, 4 N. Y. App. Div. 426; 38 N. Y. Supp. 856 [conductor]); but not for an armed altercation with the passenger after being removed from train (*Peavy v. Georgia R. Co.*, 81 Ga. 485; 8 S. E. 70). A freight-train brakeman has implied authority to eject trespassers and apparent trespassers (*Brevig v. Chicago, etc. R. Co.*, 64 Minn. 168; 66 N. W. 401).

⁹ Where a passenger has refused to pay his fare, and the conductor has lawfully stopped the train and even partially ejected him from the cars, he cannot, by offering to pay his fare, make the continuance of the process of expulsion unlawful. The expulsion may be completed, on the ground of the disorderly conduct involved (*Pease v. Delaware, etc. R. Co.*, 101 N. Y. 367; 5 N. E. 37). A railroad company may refuse to accept fare after its train has been stopped to eject a passenger for non-payment, and may again eject him if he returns to the train (*Pickens v. Richmond, etc. R. Co.*, 104 N. C. 312; 10 S. E. 556). A passenger, who willfully and captiously refuses to pay extra fare demanded of him because he has no ticket, cannot reinstate himself, after the train has been stopped to put him off, by offering to pay (*Harrison v. Fink*, 42 Fed. 787). The contrary rule was once asserted in Georgia (*South Carolina R. Co. v. Nix*, 68 Ga. 572), but it is now limited to cases of wrongful demand for fare (*Georgia, etc. R. Co. v. Asmore*, 88 Ga. 529; 15 S. E. 13). One who in good faith had quietly submitted to expulsion from the train, was entitled to the same privileges as any other citizen, and the company could not refuse to carry him after an offer to pay his fare (*Louisville, etc. R. Co. v. Breckinridge* [Ky.], 34 S. W. 702 [expulsion probably wrongful]).

the right to pay and remain.¹⁰ If the carrier's agent, by mistake, fraud or malice, sells a ticket which is not in proper form to enable the passenger to travel upon the train for which he was entitled to use it,¹¹ or refuses to stamp one as re-

¹⁰ *O'Brien v. N. Y. Central R. Co.*, 80 N. Y. 236.

¹¹ *N. Y., Lake Erie, etc. R. Co. v. Winter*, 143 U. S. 60; 12 S. Ct. 356 [mistakes of ticket agent and first conductor]; *Callaway v. Mellett*, 15 Ind. App. 366; 44 N. E. 198 [ticket agent]; *Elliot v. N. Y. Central R. Co.*, 53 Hun, 78; 6 N. Y. Supp. 363 [station doorkeeper directed ticket-holder to wrong train]. A passenger is entitled to notice of change in rules as to sale of tickets and stoppage of trains (*Sheets v. Ohio River R. Co.*, 39 W. Va. 475; 20 S. E. 566); *Murdock v. Boston, etc. R. Co.*, 137 Mass. 293; *Georgia R. Co. v. Olds*, 77 Ga. 673 [mistake]; *Georgia R., etc. Co. v. Dougherty*, 86 Ga. 744; 12 S. E. 747 [same: passenger not bound to examine ticket]; *Ellsworth v. Chicago, etc. R. Co.*, 95 Iowa, 98; 63 N. W. 584 [wrong stamp]; *Trice v. Chesapeake, etc. R. Co.*, 40 W. Va. 271; 21 S. E. 1023 [same]; *St. Louis, etc. R. Co. v. Mackie*, 71 Tex. 491; 9 S. W. 451 [ticket agent furnished second-class ticket by mistake]; *Laird v. Pittsburgh Traction Co.*, 166 Pa. St. 4; 31 Atl. 51 [error in punching transfer check]. So where a conductor, by mistake, etc., spoils or takes up a ticket, the passenger cannot lawfully be ejected by a second conductor, due explanation being offered (*Kansas City, etc. R. Co. v. Riley*, 68 Miss. 765; 9 So. 443 [ticket spoiled]; *Philadelphia, etc. R. Co. v. Rice*, 64 Md. 63; 21 Atl. 97 [conductor punched wrong coupon]; *Ohio, etc. R. Co. v. Cope*, 36 Ill. App. 97 [coupon detached by mistake]; *Louisville, etc. R. Co. v. Conrad*, 4

Ind. App. 83; 30 N. E. 406 [same]; *Baltimore, etc. R. Co. v. Bambrey* [Pa.], 16 Atl. 67 [taken up]; *East Tennessee, etc. R. Co. v. King*, 88 Ga. 443; 14 S. E. 708 [taken up]. See also *Carpenter v. Washington, etc. R. Co.*, 121 U. S. 474; 7 S. Ct. 1002 [verdict for defendant]; *Louisville, etc. R. Co. v. Gaines*, Ky.

36 S. W. 174 [agent gave ticket unduly limited]; *Evansville, etc. R. Co. v. Cates*, 14 Ind. App. 172; 41 N. E. 712 [ticket in wrong direction]. Of course, if the defect in the ticket is caused by the default of one who is *not* an agent of the very company refusing to accept it, the question is an entirely different one (*Mosher v. St. Louis, etc. R. Co.* 127 U. S. 390; 8 S. Ct. 1324). Passengers are not, under such circumstances, bound to pay fare and sue for the amount, but may submit to ejection and recover damages (*Pennsylvania Co. v. Bray*, 125 Ind. 239; 25 N. E. 439). But in Maryland, it is held that a railroad ticket presented by a passenger is conclusive evidence of the extent of his rights, as between him and the conductor of the train; and when, by its terms, it does not entitle him to passage, although the fault may be that of the railroad company or its agent, it is his duty to pay the fare demanded, and seek his remedy for the breach of contract, and, on his refusal to pay, he may rightfully be ejected (*Western Maryland R. Co. v. Stocksedale*, 83 Md. 245; 34 Atl. 880). The cases cited in the Maryland opinion do not support its broad statements. The rule appears to be that it is only where the passenger actually knows

quired,¹² a passenger using it in good faith, may recover from the carrier for his ejection, although he could not recover against the conductor personally.¹³ A passenger, who is offensively disorderly¹⁴ or persists in violating reasonable rules, after notice,¹⁵ or who is suffering from an infectious and dangerous disease,¹⁶ may also be ejected. But the carrier is responsible for any

that the ticket given him is one which cannot possibly be good and ought to be accepted, that he is not at liberty to attempt to travel on it. Certainly he may use it, if apparently good (*Hufford v. Grand Rapids, etc. R. Co.*, 53 Mich. 118; 18 N. W. 580). Any other rule would establish one law for the rich and another for those who carry only just enough money to pay their unavoidable expenses; a class which includes nine-tenths of all American women, since their husbands or fathers rarely allow them a cent more than is absolutely necessary. The Maryland doctrine involves an investigation into every traveler's pockets.

¹² *Missouri Pac. R. Co. v. Martino* [Tex. Sup.], 18 S. W. 1066 [agent refused to stamp ticket]. The fact that the agent had omitted to stamp the coupon did not excuse the company for ejecting the passenger on presentation of the coupon unstamped, the passenger not having learned of the agent's omission till he had taken the train (*Northern Pac. R. Co. v. Pauson*, 17 C. C. A. 287; 70 Fed. 585).

¹³ See *Frederick v. Marquette, etc. R. Co.*, 37 Mich. 342.

¹⁴ *Sullivan v. Old Colony R. Co.*, 148 Mass. 119; 18 N. E. 678 [drunk and disorderly]; *Louisville, etc. R. Co. v. Logan*, 88 Ky. 232; 10 S. W. 655 [drunk, violent and indecent]; *McKernan v. Manhattan R. Co.*, 54 N. Y. Super. Ct. 354 [drunk]. The conductor of a car may eject an intoxicated passenger, if he is offensive

to other passengers (*Murphy v. Union R. Co.*, 118 Mass. 228); or if it is reasonably certain that he will become so (*Vinton v. Middlesex R. Co.*, 11 Allen, 304; *Hall v. Memphis, etc. R. Co.*, 9 Fed. 585; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350; *Eads v. Metropolitan R. Co.*, 43 Mo. App. 536 [calling conductor a liar]). A passenger, with or without a ticket, has no right to remain on a train when he is disorderly, or uses obscene, profane or vulgar language (*Peavy v. Georgia R. Co.*, 81 Ga. 485; 8 S. E. 70). Willfully refusing to pay legal fare, to the point of compelling a stoppage of the train and his partial ejection, is disorderly conduct (see note 10, *supra*).

¹⁵ A passenger may be ejected for refusing to conform to a rule that coupons should be detached by the conductor in collecting fare, and should not be accepted if detached from the book if known to and accepted by him (*Norfolk, etc. R. Co. v. Wysor*, 82 Va. 250); or requiring a ticket to be stamped or signed (*Edwards v. Lake Shore, etc. R. Co.*, 81 Mich. 364; 45 N. W. 827); or excluding dogs (*Butler v. Steinway R. Co.*, 87 Hun, 10; 33 N. Y. Supp. 845); or providing separate car for colored people, as good as any others (*Chesapeake, etc. R. Co. v. Wells*, 1 Pickle, 613; 4 S. W. 5). See *Thompson v. Truesdale*, 61 Minn. 129; 63 N. W. 259 [waiver of provision in ticket requiring coupons to be detached by conductor].

¹⁶ *Paddock v. Atchison, etc. R. Co.*, 37 Fed. 841.

mistake in judging of such cases, however natural. The sincere belief of his servants that a passenger is drunk, who is in fact quite sober, but sick,¹⁷ or that he is infectiously diseased, when in fact he is not, is no excuse. The ejection of a passenger, or even of a trespasser, must be made with ordinary care¹⁸ and with as little violence and inconvenience as is reasonably practicable. Therefore, if he is ejected while the vehicle is in motion,¹⁹ or with unnecessary force,²⁰ the carrier is liable

¹⁷ *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57; 5 So. 259 [apoplexy and vomiting]; *Regner v. Glens Falls, etc. R. Co.*, 74 Hun, 202; 26 N. Y. Supp. 623 [St. Vitus' dance].

¹⁸ *Kline v. Central Pac. R. Co.*, 37 Cal. 400; *Gill v. Rochester, etc. R. Co.*, 37 Hun, 107; *Gallena v. Hot Springs R. Co.*, 13 Fed. 116. See *State v. Kinney*, 34 Minn. 311; *Louisville, etc. R. Co. v. Sullivan*, 81 Ky. 624; *N. J. Steamboat Co. v. Brockett*, 121 U. S. 637; 7 S. Ct. 1039. The law as to care and unnecessary violence in the expulsion of a person from a train is the same, whether the person is rightfully or wrongfully on board (*Southern Pac. Co. v. Kennedy*, 9 Tex. Civ. App. 232; 29 S. W. 394). As to when a conductor was justified in pushing the passenger off the car platform, see *Atchison, etc. R. Co. v. Brown*, 2 Kans. App. 604; 42 Pac. 588; *Chicago, etc. R. Co. v. Doherty*, 53 Ill. App. 282. Even if plaintiff was a trespasser, the driver was not justified in removing her from the car with such disregard of her personal safety; but plaintiff's youth exempted her from the charge of being a "trespasser," in the legal signification of the word (*Barre v. Reading R. Co.*, 155 Pa. St. 170; 26 Atl. 99).

¹⁹ *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; *Penn. R. Co. v. Vandiver*, 42 Pa. St. 365; *Holmes v. Wakefield*, 12 Allen, 580; *Meyer v.*

Pacific R. Co., 40 Mo. 151; *Chicago R. Co. v. Pelletier*, 134 Ill. 120; 24 N. E. 770; *Fell v. Northern Pac. R. Co.*, 44 Fed. 248; *Thompson v. Yazoo, etc. R. Co.*, 72 Miss. 715; 17 So. 229 [boy trespasser]; *Texas, etc. R. Co. v. Mother*, 5 Tex. Civ. App. 87; 24 S. W. 79 [trespasser]. One who is compelled, by threats, to jump off a moving car, can recover. (*Gulf, etc. R. Co. v. Kirkbride*, 79 Tex. 457; 15 S. W. 495; *Bogges v. Chesapeake, etc. R. Co.*, 37 W. Va. 297; 16 S. E. 525.)

²⁰ In ejecting a passenger from a street-car the conductor can use no more force than is necessary for that purpose, and if he do so the company will be liable (*Haman v. Omaha R. Co.*, 35 Neb. 74; 52 N. W. 830; *Jardine v. Cornell*, 50 N. J. Law, 485; 14 Atl. 590; *Pennsylvania Co. v. Connel*, 127 Ill. 419; 20 N. E. 89 [finding that force used in ejecting passenger was willful or wanton]; *St. Louis R. Co. v. Huffman*, Tex. Civ. App.; 32 S. W. 30; *Alabama, etc. R. Co. v. Frazier*, 93 Ala. 45; 9 So. 303 [willful violence]; *Citizens' R. Co. v. Willooby*, 134 Ind. 563; 33 N. E. 627). For cases in which it was held that no undue violence was used, see *Wright v. California Cent. R. Co.*, 78 Cal. 360; 20 Pac. 740; *Atchison, etc. R. Co. v. Gants*, 38 Kans. 608; 17 Pac. 54; *N. Y., Lake Erie, etc. R. Co. v. Bennett*, 1 C. C. A. 544; 50 Fed. 496 [mere words].

for the consequences. It is not, however, *as matter of law*, a want of ordinary care to eject an active man from a horse-car while it is in motion;²¹ though it might be to so eject an invalid or a child. Statutes sometimes prescribe that the ejection of passengers is to be made at a station or dwelling-house: in which case passengers cannot be put off at other places;²² but in the absence of such statutes, there is no such rule at common law, in favor of willful wrongdoers.²³ They must not, however, be put off at dangerous places; and a place which affords no convenient access to a highway is usually considered dangerous.²⁴ And prudence must be used in every respect, in selecting the point of ejection. An intoxicated person must not be put off at a time or place likely to cause him needless injury;²⁵ and one put off on account of an infectious disease

²¹ *Murphy v. Union R. Co.*, 118 Mass. 238. The question is usually one for the jury.

²² *Chicago, etc. R. Co. v. Peacock*, 48 Ill. 253; *Higgins v. Watervliet Turnpike, etc. Co.*, 46 N. Y. 23; *Boehm v. Duluth, etc. R. Co.*, 91 Wis. 592; 65 N. W. 506; *Nichols v. Union Pac. R. Co.*, 7 Utah, 510; 27 Pac. 693. As to what is a "station," under such statutes, see *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 596; 15 Atl. 411; *Lake Erie, etc. R. Co. v. Mays*, 4 Ind. App. 413; 30 N. E. 1106; *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163; 21 N. E. 7; *Wright v. California C. R. Co.*, 78 Cal. 360; 20 Pac. 740. *Laws Fla. c. 1987*, § 41, which prohibits the expulsion of a passenger by a railroad company for non-payment of fare at any point other than a usual stopping place, or near some dwelling-house, does not apply to the expulsion of a passenger wantonly violating any other reasonable rule of the company (*South Fla. R. Co. v. Rhoads*, 25 Fla. 40; 5 So. 633). Rules of the company are not equivalent to a statute in this respect (*Moore v. Columbia, etc. R. Co.*, 38 S. C. 1; 16 S. E. 781).

²³ *Great Western R. Co. v. Miller*, 19 Mich. 305; *Beebe v. Ayres*, 28 Barb. 275. The conductor may remove a person refusing to pay his fare, at any point on the road, provided the place selected is not such as to work an injury to him (*Moore v. Columbia, etc. R. Co.*, 38 S. C. 1; 16 S. E. 781; *Rudy v. Rio Grande W. R. Co.*, 8 Utah, 165; 30 Pac. 366; *Magee v. Oregon R., etc. Co.*, 46 Fed. 734). If a person entering a train refuses to pay his fare when lawfully demanded, he is a trespasser, and not a passenger, and at common law the carrier is not bound to put him off at a station, or usual stopping place, provided it will not expose him to serious danger, or result in wanton injury to him (*Wyman v. Northern Pac. R. Co.*, 34 Minn. 210; 25 N. W. 349). Otherwise, as to one *not* a trespasser (*Hardenbergh v. St. Paul, etc. R. Co.*, 39 Minn. 3; 38 N. W. 625).

²⁴ See cases in next note.

²⁵ A man got on a train in an intoxicated condition, and, on his fare being demanded by the conductor, refused to pay, and was put off the train at a point between stations.

must be set down at a place where it is reasonably expected that he can receive necessary assistance.²⁶ Persons entering a train in good faith, by mistake, are entitled to especial care and consideration, when required to quit the train.²⁷ A passenger may recover for a wrongful expulsion from a railroad train, though no force was used, where he left the train against his own will, in compliance with an apparently peremptory order of the conductor.²⁸

§ 494. **Carrier not insurer.**—No carrier is liable for the safety of passengers to the same extent that a common carrier is for the safety of property. He is not bound to insure the safety of passengers,¹ nor responsible for injuries suffered by them from any cause other than the negligence or willful wrong of himself or his agents.² This has long been settled as

It was cold, and there was snow on the ground, and, being helplessly drunk, he was frozen. Held, that to eject one from a train when he is in such a physical or mental condition that serious bodily harm may result from it is culpable negligence (Louisville, etc. R. Co. v. Sullivan, 81 Ky. 624). To same effect, Louisville, etc. R. Co. v. Johnson, 108 Ala. 62; 19 So. 51; s. c., before, 104 Ala. 241; 16 So. 75; Louisville, etc. R. Co. v. Ellis, 97 Ky. 330; 30 S. W. 979 [train coming]. In Roseman v. Carolina Cent. R. Co., 112 N. C. 709; 16 S. E. 766; and in Louisville, etc. R. Co. v. Johnson, 92 Ala. 204; 9 So. 269, it was held that sufficient care had been taken.

²⁶ Paddock v. Atchison, etc. R. Co., 37 Fed. 841 [small-pox passenger].

²⁷ Lewis v. Delaware, etc. Canal Co., 145 N. Y. 508; 40 N. E. 248; International, etc. R. Co. v. Smith [Tex.], 1 S. W. 565. Where plaintiff having a ticket over another road, showed it to the brakeman of defendant's train before getting on, and he assisted her and her children on; held, that the conductor was not justified in putting her off the train

at a station that was not a reasonably safe and convenient point from which she could expeditiously reach her proper train (Patry v. Chicago, etc. R. Co., 82 Wisc. 408; 52 N. W. 312).

²⁸ Georgia R. Co. v. Eskew, 86 Ga. 641; 12 S. E. 1061.

¹ N. J. Traction Co. v. Gardner [Ct. Errors], N. J. Law ; 31 Atl. 893 [horse-car]; Thomas v. Manhattan R. Co., 75 Hun, 548; 27 N. Y. Supp. 608; Furnish v. Missouri Pac. R. Co., 102 Mo. 438; 13 S. W. 1044; Smith v. Chicago, etc. R. Co., 108 Mo. 243; 18 S. W. 971; Gulf, etc. R. Co. v. Killebrew [Tex. Sup.], 20 S. W. 182.

² Daniel v. Metropolitan R. Co., L. R. 5 H. L. 45; Readhead v. Midland R. Co., L. R. 4 Q. B. 379; Simmons v. New Bedford, etc. S. B. Co., 97 Mass. 361; Ingalls v. Bills, 9 Metc. 1; McClenaghan v. Brock, 5 Rich. Law, 17; McLane v. Sharpe, 2 Harringt. 481; Stockton v. Frey, 4 Gill, 406; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Sherlock v. Alling, 44 Id. 184; Aston v. Heaven, 2 Esp. 533; Christie v. Griggs, 2 Campb. 79; Crofts v. Waterhouse, 3 Bing.

to the materials used by a railroad company upon its road-bed. Thus, no recovery is allowed for damage done by a defective rail or a rotten bridge, where negligence is not proved,³ and still less for a break in the track, caused by a sudden and extraordinary flood,⁴ by frost,⁵ or by the willful act of a stranger,⁶ unless the injury happens to a train which the servants of the carrier run upon the broken track after they, or those who ought to advise them, have had notice of its condition, or have had sufficient opportunity to learn of it. And, although it was at one time doubted, it is now settled that the same rule applies to vehicles and everything else furnished by the carrier.⁷

§ 495. Degree of care required.—Out of special regard for human life, and acting upon the presumption that every man who commits his person to the charge of others expects from them a higher degree of care for his bodily safety than they would bestow upon the preservation of his property, the law very wisely exacts from a common carrier of passengers for hire, in the performance of his duties as such, the utmost care and skill¹

319. A carrier is not responsible for injuries to a passenger resulting from the negligence of another passenger (*Graeff v. Philadelphia, etc. R. Co.*, 161 Pa. St. 230; 28 Atl. 1107; *Joy v. Winnisimmet Co.*, 114 Mass. 63). A passenger on a street railway car was injured by a passing load of hay. Held, he must prove affirmatively some negligence on the part of the company, contributing to the accident (*Federal St., etc. R. Co. v. Gibson*, 96 Pa. St. 83).

³ *McPadden v. N. Y. Central R. Co.*, 44 N. Y. 478; and see *Deyo v. N. Y. Central R. Co.*, 34 Id. 9; *Wabash, etc. R. Co. v. Koenigsam*, 13 Ill. App. 505 [broken trestle].

⁴ See cases cited under § 407, *ante*.

⁵ *Heazle v. Indianapolis, etc. R. Co.*, 76 Ill. 501.

⁶ *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9; *Keeley v. Erie R. Co.*, 47 How. Pr. 256. A railroad company is not liable for an injury to a pas-

senger, caused by the precipitation of a train into a chasm, the bridge over which had been burnt by the public enemy, if the officers in charge of the train had no means of knowing that the bridge had been burnt (*Sawyer v. Hannibal, etc. R. Co.*, 27 Mo. 240).

⁷ *Carroll v. Staten Isl. R. Co.*, 58 N. Y. 126 [steamboat boiler]. See more fully, § 497, *post*.

¹ *Simmons v. New Bedford, etc. Steamb. Co.*, 97 Mass. 361; *McElroy v. Nashua, etc. R. Co.*, 4 Cush. 400; *Union Pacific R. Co. v. Hand*, 7 Kans. 380; *Louisville Ry. Co. v. Park*, 96 Ky. 580; 29 S. W. 455. Carriers of passengers for hire are bound to exert the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skillfulness, either in themselves or their servants (*Sales v. Western Stage Co.*, 4 Iowa, 547; *Fairchild v. California*

which very prudent and skillful men² would use under similar circumstances, for their own protection;³ or, as it is sometimes expressed, he must use "the highest degree of practicable care;"⁴

Stage Co., 13 Cal. 599; Johnson v. Winona, etc. R. Co., 11 Minn. 296; see Jeffersonville R. Co. v. Hendricks, 26 Ind. 228). The highest degree of care which a reasonable man would use is required of them (Derwort v. Loomer, 21 Conn. 245). They must use the utmost care and skill of very cautious persons (Maverick v. Eighth Ave. R. Co., 36 N. Y. 378; Taylor v. Grand Trunk R. Co., 48 N. H. 308; White v. Fitchburg R. Co., 136 Mass. 321); "the utmost care and diligence" (California Civil Code, § 1200; Fisher v. Southern Pac. R. Co., 89 Cal. 399; 26 Pac. 894). A conductor who has taken up a passenger's ticket en route is chargeable with "extreme care" in seeing that the passenger is provided with the means of continuing his journey (Sloane v. Southern Cal. Ry. Co., 111 Cal. 668; 44 Pac. 320). A railroad company is required to use the utmost practicable care in providing for the safety of passengers, and to use that high degree of prudence, diligence and care which would be used by very cautious, prudent, and competent persons under similar circumstances (Levy v. Campbell [Tex. Sup.], 19 S. W. 438; Gallagher v. Bowie, 66 Tex. 265; 17 S. W. 407). Carriers of passengers, while not absolute insurers of the safety of their passengers, are required to use all means that care, vigilance, and foresight can reasonably do, in view of the mode of conveyance adopted, to prevent accidents (Chicago, etc. R. Co. v. Lewis, 145 Ill. 67; 33 N. E. 960). See other cases cited under §§ 45, 46, *ante*.

² Chattanooga, etc. R. Co. v. Hugins, 89 Ga. 494; 15 S. E. 848 ["very

prudent persons"]; O'Connell v. St. Louis Cable, etc. R. Co., 106 Mo. 483; 17 S. W. 494 [highest degree of care of a very prudent person]; Maverick v. Eighth Ave. R. Co., 36 N. Y. 378 ["very cautious persons"]. The degree of care imposed upon a common carrier is the highest, and an instruction that the railroad company was bound to use the utmost care and diligence that prudent and careful men should have exercised is not strong enough (Meyer v. St. Louis, etc. R. Co., 4 C. C. A. 221; 54 Fed. 116). But held that a charge, requiring "all such precautions to avoid the injury as would be suggested by the highest degree of care, skill, and diligence, by men of extraordinary care, skill and diligence, in carrying passengers by dummy line railways," states too high a standard for employment on railroads (Gadsden, etc. R. Co. v. Causler, 97 Ala. 235; 12 So. 439). See St. Louis, etc. R. Co. v. Sweet, 57 Ala. 287; 21 S. W. 587.

³ The circumstances must always be taken into account (Smith v. Chicago, etc. R. Co., 108 Mo. 243; 18 S. W. 971 [approving our §§ 495, 496]). The carriers' own personal safety is to be considered as a test of what he ought to do for others.

⁴ Louisville, etc. R. Co. v. Snyder, 117 Ind. 435; 20 N. E. 284; Moore v. Des Moines, etc. R. Co., 69 Iowa, 491; 30 N. W. 51; Sullivan v. Jefferson Ave. R. Co., 133 Mo. 1; 34 S. W. 566; Montgomery, etc. R. Co. v. Mallette, 92 Ala. 209; 9 So. 363; Ft. Worth, etc. R. Co. v. Kennedy, 12 Tex. Civ. App. 654; 35 S. W. 335 [to enable passengers to alight]. Where a passenger in defendant's street-car was injured

or "extraordinary care;"⁵ or must provide for "safe conveyance, so far as human care and foresight can secure that result;"⁶ and such a carrier is "responsible for the slightest neglect to use such care."⁷ It has often been held that a charge requiring from such a carrier "all possible care," is not too strict, when coupled with a reference to the actual circumstances of the case.⁸ But it has more recently been held that such a charge, when *not* explained and limited by reference to circumstances making its meaning clear, is erroneous.⁹ This rule has been constantly applied to carriers by

by a collision between the car and a train at a railroad crossing; held, proper to charge the jury, in view of the special circumstances, that defendant "was bound to exercise the highest degree of care and prudence, the utmost human skill and foresight" (*Coddington v. Brooklyn, etc. R. Co.*, 102 N. Y. 66; 5 N. E. 797). The care, skill and diligence required of carriers of passengers are of the highest degree, and must be proportionate to the danger of their particular mode of conveyance; but they are not insurers against all accidents, and the passengers take all the risks incident to the mode of travel (*Galena, etc. R. Co. v. Fay*, 16 Ill. 558; *Sherlock v. Alling*, 44 Ind. 184). See § 51, *ante*.

⁵ Common carriers of passengers are bound to exercise extraordinary care, and are liable for the slightest negligence (*Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; 55 N. W. 270; *Davis v. Chicago, etc. R. Co.*, 93 Wisc. 470; 67 N. W. 1132; *Caldwell v. Murphy*, 1 Duer, 233). Common carriers of passengers are bound to use more than ordinary care—*i. e.*, more than such care as is used by very cautious persons; and if a passenger receives an injury which any reasonable care and skill could have prevented, the carrier is liable

therefor (*Edwards v. Lord*, 49 Me. 279).

⁶ *Weed v. Panama R. Co.*, 5 Duer, 193; *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378; *Brown v. N. Y. Central R. Co.*, 34 Id. 404.

⁷ *Chicago, etc. R. Co. v. Byrum*, 153 Ill. 131; 33 N. E. 578; *Bischoff v. People's R. Co.*, 121 Mo. 216; 25 S. W. 908; *Pershing v. Chicago, etc. R. Co.*, 71 Iowa, 561; 32 N. W. 488; *Louisville, etc. R. Co. v. Ritters*, 85 Ky. 368; 3 S. W. 591. If a carrier of passengers omits any reasonable practicable precaution tending to insure the safety of passengers, the omission is such negligence as will make him liable (*Anderson v. Scholey*, 114 Ind. 553; 17 N. E. 125).

⁸ *Indianapolis, etc. R. Co. v. Horst*, 93 U. S. 295; *Topeka R. Co. v. Higgs*, 38 Kans. 375; 16 Pac. 667.

⁹ An instruction that the carrier must use "all possible care" is erroneous, since carriers are required to exercise, not the highest conceivable degree of prudence, but only the utmost that can be exercised under the circumstances, short of a warranty of the safety of the passengers (*International, etc. R. Co. v. Welch*, 86 Tex. 203; 24 S. W. 390; *S. P. Smith v. Chicago, etc. R. Co.*, 108 Mo. 243; 18 S. W. 971; *Dougherty v. Mo. R. Co.*, 97 Mo. 647; 11 S. W. 251).

stage-coach¹⁰ and steamboat;¹¹ and much more is it applicable to steam railroads,¹² which mode of conveyance, involving greater dangers, demands unusual care. It is equally applicable to street railroads, whether using cable, electric or horse power.¹³ Nor can any allowance be made in favor of a carrier whose financial condition is embarrassed.¹⁴ It is the duty of a

¹⁰ *Farish v. Reigle*, 11 Gratt, 697. To the same effect are *Maury v. Talmadge*, 2 McLean, 157; *Derwort v. Loomer*, 21 Conn. 245; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Sales v. Western Stage Co.*, 4 Iowa 547; *Frink v. Coe*, 4 Greene, 555.

¹¹ *New World v. King*, 16 How. U. S. 469; *Miller v. Ocean S. S. Co.*, 118 N. Y. 199; 23 N. E. 462; *Hall v. Conn. R. Steamboat Co.*, 13 Conn. 319; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *The Pilot Boy*, 23 Fed. 108.

¹² *Pennsylvania R. Co. v. Roy*, 102 U. S. 451; *Taber v. Delaware, etc. R. Co.*, 71 N. Y. 489; *Moreland v. Boston, etc. R. Co.*, 141 Mass. 31; 6 N. E. 225; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *Phila., etc. R. Co. v. Boyer*, 97 Pa. St. 91; *Baltimore, etc. R. Co. v. Wightman*, 29 Gratt, 431; *Searle v. Kanawha, etc. R. Co.*, 32 W. Va. 370; 9 S. E. 248; *Thayer v. St. Louis, etc. R. Co.*, 22 Ind. 26; *Galena, etc. R. Co. v. Yarwood*, 15 Ill. 468; *Louisville, etc. R. Co. v. McCoy*, 81 Ky. 403; and cases cited under § 51, *ante*.

¹³ So held as to horse-cars (*Codding-ton v. Brooklyn, etc. R. Co.*, 102 N. Y. 66; *Maverick v. Eighth Ave. R. Co.*, 36 Id. 378; *Wynn v. Central Park R. Co.*, 14 N. Y. Supp. 172; *Hencke v. Milwaukee R. Co.*, 69 Wisc. 401; 34 N. W. 243; *Noble v. St. Joseph, etc. R. Co.*, 98 Mich. 249; 57 N. W. 126 [care in selecting horses]); and more emphatically as to cable and electric cars (*Watson v. St. Paul R. Co.*, 42 Minn. 46; 43 N.

W. 904; *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199; 24 S. W. 192; *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227; 33 Pac. 389). A passenger may, by his situation on an electric car, be so exposed to danger or injury by a rapid movement of the car upon a sharp curve as to require the motor-man, advised of the situation and having the car under his control, to use extra care for the safety of the passenger (*Lansing v. Coney Island R. Co.*, 16 N. Y. App. Div. 146; 45 N. Y. Supp. 120). A street railway company is bound to exercise the highest degree of skill and foresight for the safe carriage of passengers upon its cars; and this care and foresight must extend, not only to the running of its cars, but also to the construction and repairs of its track (*Citizens' St. R. Co. v. Twi-name*, 111 Ind. 587; 13 N. E. 55). An instruction that a street-car company is bound only to use such diligence in keeping its steps clear of mud as ordinarily prudent persons use is improper, since it lowers the degree of care required of carriers (*Louisville R. Co. v. Park*, 96 Ky. 580; 29 S. W. 455). A carrier is bound to use the utmost care in transferring passengers (*Hamilton v. Great Falls R. Co.*, 17 Mont. 334; 42 Pac. 860). As to care and attention to be given to passenger who becomes ill on train, see *Lake Shore, etc. R. Co. v. Saltzman*, 9 Ohio C. C. 230.

¹⁴ *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304.

passenger carrier to adopt all precautions which have been practically tested and are known to be of value,¹⁵ and to have all the skill which is possessed by men whose services it would have been reasonably practicable for him to secure. Therefore, the mere neglect to adopt new improvements from time to time, as their value is demonstrated, is enough to make the carrier liable for accidents which might have been avoided by the use of such improvements.¹⁶

§ 496. Application of rule requiring great care. — The rule requiring great care from carriers is not to be pressed to an extent which would make the conduct of the business so expensive as to be wholly impracticable.¹ Therefore, it is not to be construed as meaning that the carrier must adopt all the precautions that an ingenious mind or scientific skill could suggest,² nor that he must use all the precautions which could possibly be taken,³ or which, after an accident has happened, it can be seen would have sufficed to avoid it,⁴ nor even that he must use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur,⁵ nor that he must foresee and provide against casualties never before known and not reasonably to be expected.⁶ He must,

¹⁵ *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Knight v. Portland, etc. R. Co.*, 56 Me. 234. See *Meier v. Penn. R. Co.*, 64 Pa. St. 225. If a railroad company undertook to conduct the running of trains by telegraph, it was bound to have a proper line for this purpose, with a reasonable number of stations and operators to properly control the movements of trains (*Grand Trunk R. v. Walker*, 154 U. S. 653; 14 S. Ct. 1189).

¹⁶ Where the defendant neglected to adopt a new and useful improvement in the construction of a switch, and such omission caused the accident, held, that the defendant was liable (*Smith v. Harlem R. Co.*, 19 N. Y. 127).

¹ *Pittsburgh, etc. R. Co. v. Thompson*, 56 Ill. 138.

² A railway company is bound to

use the best precautions in known practical use to secure the safety of their passengers, but not every possible precaution which the highest scientific skill (according to speculative evidence) might have suggested (*Ford v. Southwestern R. Co.*, 2 Fost. & F. 730; *Steinweg v. Erie R. Co.*, 43 N. Y. 123; see *Tuller v. Talbot*, 23 Ill. 357).

³ The court properly refused to charge that defendant carrier was negligent if it was possible for it to have prevented the accident (*Gilbert v. West End R. Co.*, 160 Mass. 403; 36 N. E. 60).

⁴ *Loftus v. Union Ferry Co.*, 84 N. Y. 455.

⁵ *Cornman v. Eastern Counties R. Co.*, 4 Hurlst. & N. 781, and cases cited under §§ 406, 407, 410, *ante*.

⁶ See cases cited under § 11, *ante*.

however, take every practicable precaution against dangers which he does or ought to foresee.⁷

§ 497. Obligations as to vehicle.—It is now universally agreed that a common carrier, whether by stage, railroad, steamboat or otherwise, is not absolutely bound to provide

Plaintiff's intestate was a passenger upon defendant's boat. The forward deck was not designed for passengers, but they were permitted to go there; the intestate went thereon, slipped under the gangway rail and was drowned. It appeared that all boats on the lake were constructed in the same manner, that they had been so run for many years, and there was no proof that any similar accident had happened before, or had been apprehended. Held, that the evidence failed to show negligence, and that plaintiff was properly nonsuited (*Dougan v. Champlain Trans. Co.*, 56 N. Y. 1). So also held where the company had corrugated brass plates on the stairway, on which plaintiff slipped, and it was shown that the stairs were finished in the same manner as upon the best river-boats; that the boat had been in use a year, and had carried a thousand passengers a day without any accident of the kind before (*Crocheron v. North Shore, etc. Ferry Co.*, 56 N. Y. 656). A steamboat company was held not to be liable where plaintiff fell overboard because of, "in the first place, an attempt of three rash persons to regain the land after the boat had started, then the entirely heedless and unthinking rush and pressure of a crowd of passengers of ordinary sobriety and prudence; and then the wrongful opening of the gate by an unauthorized person" (*Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306). Followed in *Loftus v. Union Ferry*

Co., 84 N. Y. 455; *affi'g* 22 Hun, 33. A passenger was injured by a wringer falling upon him from the rack above the seat. It was wrapped in brown paper, and there was nothing to attract particular attention to it. Held, no evidence of negligence (*Morris v. N. Y. Cent. R. Co.*, 106 N. Y. 678; 13 N. E. 455). It is no proof of negligence in constructing tracks that a passenger standing upon the side platform of an open car was struck by a passing car, where thousands of passengers have been carried upon such cars for more than twenty years, with no similar accident (*Craighead v. Brooklyn R. Co.*, 123 N. Y. 391; 25 N. E. 387). *s. p.*, *Fox v. New York*, 70 Hun, 181; 24 N. Y. Supp. 43. A passenger on a train, who was somewhat intoxicated, though he conducted himself without offense, accidentally stumbled over some baggage; and a revolver fell from his pocket, wounding another passenger in the foot. Held, that the carrier had no reason to anticipate such an accident, and was not liable (*Galveston, etc., R. Co. v. Long*, Tex. Civ. App. ; 36 S. W. 485). See *Norfolk, etc. R. Co. v. Marshall*, 90 Va. 836; 20 S. E. 823 [track washed away by waterspout].

⁷ *Miller v. Ocean S. S. Co.*, 118 N. Y. 199; 23 N. E. 462; *Merwin v. Manhattan R. Co.*, 48 Hun, 603; *Meyer v. St. Louis, etc. R. Co.*, 4 C. C. A. 221; 54 Fed. 116 [carrier bound to restrain passenger, known to be insane]. Conceded in *Loftus v. Union Ferry Co.*, 84 N. Y. 455.

safe and "roadworthy" vehicles, and is not responsible for any defects therein which could not have been discovered by any known tests, either in its use or in the process of its manufacture.¹ On the other hand, it is equally agreed that the carrier is responsible for any such defect, which he could have ascertained, after purchasing the vehicle, by the application of any tests which he knew or might have known by the use of great diligence.² Whether he is responsible for defects which could not have been thus discovered, after the vehicle came into his possession, but could have been discovered by the

¹ *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412; *aff'd*, L. R. 4 Q. B. 379. See also *Grote v. Chester*, etc. R. Co., 2 Exch. 251; *Christie v. Griggs*, 2 Campb. 79; *Israel v. Clark*, 4 Esp. 259; *Bremner v. Williams*, 1 Carr. & P. 414. In *Carroll v. Staten Isl. R. Co.* (58 N. Y. 126), *Andrews, J.*, said: "Carriers of passengers are not insurers of persons whom they carry; nor do they undertake that the vessels or vehicles which they use are absolutely free from defects. * * * Some remarks which seem adverse to this view were made by the learned judge who delivered the opinion in *Alden v. N. Y. Central R. Co.* (26 N. Y. 102); but the subsequent cases show that it was not the intention of the court to depart from the established doctrine upon the subject" (citing *McPadden v. N. Y. Central R. Co.*, 44 N. Y. 478; *Caldwell v. N. J. Steamboat Co.*, 47 Id. 290). "If the crack in the boiler was, as the referee found, undiscoverable upon examination or by the application of any tests known or practiced, and if no presumption that the boiler was defective was created by the fact that it had been in use for several years, then the fact that the defect existed, without which the explosion would not have happened, would not alone have justified a recovery."

² *Ingalls v. Bills*, 9 Metc. [Mass.] 1; *Palmer v. Delaware, etc. Canal Co.*, 120 N. Y. 170; 24 N. E. 302; *aff'g* 46 Hun, 486 [spindle of drawhead of car broke]; *Texas, etc. R. Co. v. Hamilton*, 66 Tex. 92; 17 S. W. 406 [flaw in wheel]. Plaintiff was injured while in defendant's cars, in consequence of an imperfection in a driving-wheel. It had been tested in the usual way when new, by hammering it all round, but had not been again tested, after a long use of it. A verdict for plaintiff was sustained (*Manser v. Eastern Counties R. Co.*, 6 Hurlst. & N. 899). It is the duty of a railroad company, from time to time, carefully to test and inspect its bridges, and materials used therein (*Louisville, etc. R. Co. v. Snyder*, 117 Ind. 435; 20 N. E. 284); and so as to tracks, switches, cars and trucks (*St. Louis, etc. R. Co. v. Mitchell*, 57 Ark. 418; 21 S. W. 883). A common carrier of passengers may be liable for injuries arising from the breaking of an axle from the effect of frost, if it appear that he was guilty of even slight neglect in guarding against such effect (*Frink v. Potter*, 17 Ill. 406). See *Zimmerman v. Long Island R. Co.*, 14 N. Y. App. Div. 562; 43 N. Y. Supp. 883; [vacuum brakes used on front cars of train only, causing rear cars to jerk].

use of such tests during the process of manufacture, is a question upon which there is a difference of opinion. In New York, it has been distinctly held that he is.³ It was so held in England, many years ago,⁴ but in later cases, the question has been purposely left open.⁵ In Massachusetts⁶ and Scotland,⁷ it is held that he is not. A carrier is not liable for an accident happening in consequence of a defect in the road, which could not reasonably be foreseen, overstraining its vehicle at a point technically defective, but only in such respect as no reasonable man would think worthy of repair or improvement, if his attention was called to it. The carrier's obligation is only that the vehicle shall be reasonably sufficient for the journey — not that it shall in every event be safe.⁸ But the occurrence of an

³ Defendant held responsible if the defect in the axle could have been discovered in the process of manufacture by the application of any test known to men skilled in such business (*Hegeman v. Western R. Co.*, 13 N. Y. 9; *Alden v. N. Y. Central R. Co.*, 26 Id. 102). s. p., *Burns v. Cork, etc. R. Co.*, 13 Irish C. L. 547. Re-affirmed, as settled law, in *Birmingham v. Rochester, etc. R. Co.*, 59 Hun, 583; 14 N. Y. Supp. 13.

⁴ *Sharp v. Grey*, 9 Bing 457; s. c., differently reported. 2 Moore & Scott, 620.

⁵ See *Readhead v. Midland R. Co.*, L. R. 4 Q. B. 379.

⁶ *Ingalls v. Bills*, 9 Metc. 1. This case was cited before the courts in New York and England, overruled in the former, and approved in the latter. In that case, a passenger in a coach received an injury solely by reason of the breaking of one of the iron axletrees, in which there was a very small flaw, entirely surrounded by sound iron a fourth of an inch thick, and which could not be discovered by the most careful examination externally. Held, that the coach proprietor was not answerable. In *Ladd v. New Bedford R. Co.* (119

Mass. 412), a passenger sought to recover for an injury caused by a defect in a switch. Held (following *Ingalls v. Bills*, *supra*), that the carrier company "was not responsible for hidden defects, which could not have been discovered by the most careful inspection." See *Simmons v. New Bedford, etc. Steamboat Co.*, 97 Mass. 361; *Carter v. Kansas City R. Co.*, 42 Fed. 37 [cable-car grip].

⁷ *Lamb v. Lyon*, Hay, 61; 13 F. D. 799; *Anderson v. Pyper*, Hay, 23; 2 Mur. [Sc.] 261.

⁸ Per *Blackburn, J.*, *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412, 441. See *Burges v. Wickham*, 3 Best & S. 669, 693; *Wynn v. Central Park, etc. R. Co.*, 133 N. Y. 575; 30 N. E. 721 [defect in chain]. A carrier cannot be deemed negligent because the door of a passenger car was not all glass above the middle, so that persons could see each other coming to the door (*Graeff v. Philadelphia, etc. R. Co.*, 161 Pa. St. 230; 28 Atl. 1107). Sheathing over car-wheel not proof of negligence (*Farley v. Phila. Traction Co.*, 132 Pa. St. 58; 18 Atl. 1090). An omnibus is not defective by having a step with an open instead of a closed back,

injury through a defect in the vehicle is a least *prima facie* evidence of negligence on the part of the carrier.⁹ It has been held to be the duty of a railroad company to warm its passenger coaches in cold weather;¹⁰ and to maintain a light at night in the toilet-room of a sleeping-car.¹¹

§ 498. Exception as to certain vehicles. — If, however, a carrier simply permits passengers to enter a vehicle notoriously unfit for travel, and not provided by him for passenger traffic, they cannot complain of its defects.¹ Thus, the omission to place a chain across the rear of a caboose car attached to a freight train, and which was not provided for the carriage of passengers, but in which they were allowed to ride, was held

where it appears that both kinds of steps are in general use (*Frobisher v. Fifth Ave. Tr. Co.*, 151 N. Y. 431; 45 N. E. 839; rev'g 81 Hun, 544; 30 N. Y. Supp. 1099). Injury by dress catching in a broken curtain hook held insufficient proof of negligence (*Kelly v. N. Y. & Sea Beach R. Co.*, 109 N. Y. 44; 15 N. E. 879). S. P., *Seddon v. Bickley*, 153 Pa. St. 271; 25 Atl. 1104 [gangplank lying on deck].

⁹ In *Dawson v. Manchester, etc. R. Co.*, 5 Law Times, N. S. 682, the court, per Pollock, C. B., said: "Where an accident happens, as in this case, to a passenger in a carriage on a line of railway, either by the carriage breaking down or running off the rails, that is *prima facie* evidence for the jury of negligence on the part of the railway company." S. P., as to a stage-coach (*Christie v. Griggs*, 2 Campb. 76; see *Israel v. Clark*, 4 Esp. 259). Where one street-car overtook and ran into another, whereby plaintiff was injured, and the cause did not satisfactorily appear, held, that the carrier was liable, because he failed to rebut the presumption of negligence created by the fact of the accident (*Smith v. St. Paul R. Co.*, 32 Minn.

1). "As the cars and the track are within the exclusive possession and control of the company, it is incumbent upon them to explain the cause of an accident, it not being ordinarily in the power of the passengers to do so. Cars can ordinarily be run with safety; and when they are not, that fact itself is evidence of fault or defect somewhere, requiring explanation" (*Stevens v. European, etc. R. Co.*, 66 Me. 74). S. P., *Chicago R. Co. v. Young*, 62 Ill. 238.

¹⁰ *Hughes v. Pullman Car Co.*, 74 Fed. 499 [contraction of violent cold; damages not too remote]; *Hastings v. Northern Pac. R. Co.*, 53 Fed. 224. In an action for injury resulting in death, caused by the alleged negligence of defendant in failing, though requested, to warm its coaches in cold weather, it is not necessary for plaintiff to allege and prove a universal custom on the part of railway companies to warm their coaches, as such is their duty towards their passengers (*Ft. Worth, etc. R. Co. v. Hyatt*, 12 Tex. Civ. App. 435; 34 S. W. 677).

¹¹ *Piper v. N. Y. Central R. Co.*, 76 Hun. 44; 27 N. Y. Supp. 593.

¹ *International, etc. R. Co. v. Cock*, 68 Tex. 713; 5 S. W. 635 [hand-car].

to be no evidence of negligence.² Nor does it make any difference that they pay fare.³ But this exception to the general rule is not to be extended to a passenger car on the mere ground that it is attached to a freight train,⁴ nor to any car provided for passenger traffic, however obviously unfit.⁵

§ 499. Carrier's liability for condition of road.—A carrier upon an ordinary road is not presumptively responsible for the condition of the road, or for obstacles to travel upon it, because it is not subject to his control, and because he does not make any express or implied stipulation on the subject. But it is different in the case of a carrier by rail. He generally owns or leases the road-bed; and he almost invariably owns or controls the rails. And the condition of the rails and road-bed is a matter of at least equal importance to passengers with the condition of the cars in which they sit. A missing rail is a defect as serious as a broken wheel. There is, therefore, in every contract for the conveyance of a passenger by rail, an implied undertaking for the safe condition of the road as well as of the vehicle, so far as it might be secured by that degree of care and diligence which has been already defined.¹ Not only

² *Chicago, etc. R. Co. v. Hazzard*, 26 Ill. 373.

³ *Shoemaker v. Kingsbury*, 12 Wall. 369.

⁴ *Dillaye v. N. Y. C. R. Co.*, 56 Barb. 30. *s. p.*, *Newton v. Central Vt. R. R. Co.*, 80 Hun, 491; 30 N. Y. Supp. 488.

⁵ It was proper to refuse an instruction that a railroad company was excused under the circumstances for carrying a passenger in the baggage car, which did not require the jury to find that the baggage car was a safe conveyance (*Baltimore, etc. R. Co. v. Swann*, 81 Md. 400; 32 Atl. 175).

¹ The rule is stated in § 497, *ante*. The same rule applies to rails, road-bed, etc., as to vehicles (*Chicago, etc. R. Co. v. Lewis*, 145 Ill. 67; 33 N. E. 960; *Knight v. Portland, etc. R. Co.*, 56 Me. 234; *Toledo, etc. R.*

Co. v. Apperson, 49 Ill. 480; *Nashville, etc. R. Co. v. Messino*, 1 Sneed, 220). But the carrier is not liable, unless the accident might have been reasonably foreseen by a competent man, accustomed to the management of the road-bed and track of a railway, while in the exercise of extraordinary care and prudence (*Davis v. Chicago, etc. R. Co.*, 93 Wisc. 470; 67 N. W. 1132). Defendant's street railroad ran across a bridge built and maintained by the state, and plaintiff, while on one of defendant's cars, was injured by a defect in the bridge, which could have been discovered by the manufacturer, but could not be perceived after the bridge was constructed. Held, that there was no evidence of negligence on the part of the defendant (*Birmingham v. Rochester, etc. R. Co.*, 137 N. Y. 13; 32 N. E. 995).

must the road be properly constructed, but it must be kept in good condition. The servants of the carrier must examine it frequently, and make sure that the rails are in good order, firmly secured to the ground, and in every way fit for the use to which they are put. Any failure in these duties is culpable negligence.² He is bound to use the same degree of care and vigilance to avoid or remove obstructions on the track,³ or projections too near it.⁴

§ 500. Liability for acts of strangers. — Carriers by rail are not generally liable to passengers for the wrongful acts or neglects of strangers or fellow-passengers, including interference with the vehicles or tracks.¹ Carriers are not bound to foresee

² *Curtiss v. Rochester, etc. R. Co.*, 20 Barb. 282; *aff'd*, 18 N. Y. 534. See *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *Holyoke v. Grand Trunk R. Co.*, *Id.* 541; *Toledo, etc. R. Co. v. Conroy*, 68 Ill. 560 [rotten trestle-work]; *Louisville, etc. R. Co. v. Kingman*, Ky. ; 35 S. W. 264 [open switch]. It is negligence to allow the planking between the rails to become decayed and broken so as to catch the foot of a person rightfully upon the track (*Bird v. Long Island R. Co.*, 11 N. Y. App. Div. 134; 42 N. Y. Supp. 888). Where there is an open space of about a foot between the car platform and the curved edge of a station platform, the company should give a general warning to passengers crowding out of a car of the existence of the space, but it need not specially inform every individual (*Langin v. N. Y. & Brooklyn Bridge*, 10 N. Y. App. Div. 529; 42 N. Y. Supp. 353).

³ *Donnegan v. Erhardt*, 119 N. Y. 468; 23 N. E. 1051 [defective fence; collision with stray animal]; *Lynch v. N. Y. Central R. Co.*, 8 N. Y. App. Div. 458; 40 N. Y. Supp. 775; *Louisville, etc. R. Co. v. Ritter*, 85 Ky. 368; 3 S. W. 591; *Cogswell v. West*

St. R. Co., 5 Wash. St. 46; 31 Pac. 411 [duty of inspection]. But leaving freight-cars standing on the side track is not negligence where they do not interfere with travel when the tracks are in order (*Grant v. Raleigh, etc. R. Co.*, 108 N. C. 462; 13 S. E. 209). This duty cannot be delegated (*Carrico v. West Va. Central R. Co.*, 35 W. Va. 389; 14 S. E. 12).

⁴ *North Chicago R. Co. v. Williams*, 140 Ill. 275; 29 N. E. 672; *Boss v. Northern Pac. R. Co.*, 5 Dak. 308; 40 N. W. 590.

¹ Where the accident was the result of the willful criminal trespass of a stranger, the railroad company was not responsible (*Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103; 27 Atl. 689). So, as to the mere negligence of a stranger (*Moylan v. Second Ave. R. Co.*, 128 N. Y. 583; 27 N. E. 977 [truck striking passenger on car]). So, where it resulted from the innocent inadvertence of a fellow-passenger (*Ferry v. Manhattan R. Co.*, 118 N. Y. 497; 23 N. E. 822. s. p., *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1; 34 S. W. 566); or from his negligence in disposing of his baggage (*Morris v. N. Y. Central R. Co.*, 106 N. Y. 678; 13 N. E.

and guard against such interference, where it is possible but not probable.² But it is quite otherwise, where the carrier has notice, in any way, that such interference is probable, however uncertain, as where experience has shown that it is common;³ or where he fails to use the required degree of care and vigilance in inspecting the road.⁴ Upon principles already stated, a carrier is liable to passengers for an injury caused by the concurring negligence of himself and a stranger.⁵ Passengers are entitled to the benefit of statutes concerning railroad fences;⁶ and even where no such statutes exist they are entitled to have such precautions adopted as will avoid injury to them from the probable presence of animals upon the track.⁷

§ 501. When ordinary care only required. — The requirement of extraordinary care, being founded upon the special

455; *Stimson v. Milwaukee, etc. R. Co.*, 75 Wisc. 381; 44 N. W. 748; *Van Winkle v. Brooklyn R. Co.*, 46 Hun, 564; or from his rudeness in pushing (*Ellinger v. Philadelphia, etc. R. Co.*, 153 Pa. St. 213; 25 Atl. 1132). Otherwise, however, where a stranger performs a service at the request or with the assent of a servant of the company upon whom it devolves (*Dimmitt v. Hannibal, etc. R. Co.*, 40 Mo. App. 654).

² As where strangers are lawfully working upon or near the road (*Daniel v. Metropolitan R. Co.*, L. R. 5 H. L. 45). But this case was distinguished and limited, where a railroad company had consented to a gravity road being built on its land at right angles to its track, to facilitate the shipment of stone by its cars, and it was held liable for the negligence of the licensee to the injury of a passenger on its own cars (*Lynch v. N. Y. Central R. Co.*, 8 N. Y. App. Div. 458; 40 N. Y. Supp. 775).

³ *Chicago, etc. R. Co. v. McCara*, 52 Ill. 296.

⁴ See § 499, *ante*.

⁵ *Eaton v. Boston, etc. R. Co.*, 11 Allen, 500; *Carpenter v. Boston, etc. R. Co.*, 97 N. Y. 494 [postal agent threw out mail bags, which struck plaintiff]. A common carrier is liable for injuries to passengers produced by the concurrent negligence of its servants and third persons (*St. Joseph, etc. R. Co. v. Hedge*, 44 Neb. 448; 62 N. W. 887; *Sears v. Seattle R. Co.*, 6 Wash. 227; 33 Pac. 389, 1081; *Western Md. R. Co. v. Herold*, 74 Md. 510; 22 Atl. 323 [boy loosened brakes of unguarded car]).

⁶ § 447, *ante*; *Donnegan v. Erhardt*, 119 N. Y. 468; 23 N. E. 1051; *Lynch v. N. Y. Central R. Co.*, 8 N. Y. App. Div. 458; 40 N. Y. Supp. 775; and cases in next note.

⁷ *Lackawanna, etc. R. Co. v. Chenevith*, 52 Pa. St. 382; *Sullivan v. Phil. & Reading R. Co.*, 30 Id. 234; *Chicago, etc. R. Co. v. McCara*, 52 Ill. 296. It is the duty of a railway company, for the protection of passengers, to properly fence its track against the intrusion of cattle, if in so doing it will lessen the probability of accident (*Fordyce v. Jackson*, 56 Ark. 594; 20 S. W. 528, 597). S. P.,

risk of human life involved in the business of carrying passengers, is not to be extended to incidents of the business which do not involve such risk, and in which the carrier stands in the same relation to the passenger as do other business men from whom such peculiar care is not required. Hence, while a carrier must use ordinary care to make the means of approach and departure and other accessories safe for the use of passengers,¹ he is not required to use any higher degree of care, with reference to these things. Therefore, with regard to platforms, stairs, waiting-rooms in a station, the ground surrounding it and other premises of a railroad company, its obligation to passengers is only one of ordinary care,² in common with that of all other occupants of land or buildings, inviting persons to

Gulf R. Co. v. Wilson, 79 Tex. 371; 15 S. W. 280). See also Mexican Cent. R. Co. v. Lauricella, 87 Tex. 277; 28 S. W. 277.

¹ See § 506, *post*.

² The strict rule requiring the exercise of the utmost care on the part of railroad corporations to insure the safety of passengers being carried over the road, does not apply in the case of approaches to the cars, the platforms, halls, stairways, etc.; and, in the latter case, the carrier is bound simply to exercise ordinary care, in view of the dangers to be apprehended (Kelly v. Manhattan R. Co., 112 N. Y. 443; 20 N. E. 383). So held as to stairways (*Ib.*; Crafter v. Metropolitan R. Co., L. R. 1 C. P. 300); railroad platforms (Lafflin v. Buffalo, etc. R. Co., 106 N. Y. 136; 12 N. E. 599; Falls v. San Francisco, etc. R. Co. 97 Cal. 114; 31 Pac. 901); station-grounds (Moreland v. Boston & Prov. R. Co., 141 Mass. 31 [shingles lying on grounds]); toilet-room off waiting-room (Jordan v. N. Y. & New Haven R. Co., 165 Mass. 346; 43 N. E. 111); bridge over ditch by depot (Stokes v. Railroad Co., 107 N. C. 178; 11 S. E. 991); ferry bridge leading to the boats (Race v. Union Ferry Co., 138 N. Y. 644; 34 N. E.

280); dining saloon of steamship (Bruswitz v. Netherlands Nav. Co., 64 Hun, 262; 19 N. Y. Supp. 75).

To establish a case of negligence for an alleged defectiveness in a structure for the use of passengers, it must be proved that it was an improper one for its purpose, and it is not sufficient to show that by some alterations it might have been made more safe (Crafter v. Metropolitan R. Co., L. R. 1 C. P. 300; Toomey v. Brighton, etc. R. Co., 3 C. B. N. S. 146). But in South Carolina, extraordinary care is required, in favor of intending passengers, on the way to a train (Johns v. Charlotte, etc. R. Co., 39 S. C. 162; 17 S. E. 698). In *McGearty v. Manhattan R. Co.* (15 N. Y. App. Div. 2; 43 N. Y. Supp. 1086), held, that continuing to sell tickets and admitting passengers to its elevated platforms, already full, in such numbers as to crowd off a passenger already there was actionable, and the defendant's liability did not rest upon the insufficiency of the platform to accommodate ordinary traffic, or that the platform as such was defective. See also *Taylor v. Pennsylvania R. Co.*, 50 Fed. 755 (note 2, § 506, *post*).

enter thereon, for compensation; since passengers are no more endangered, in such places, than they are on similar premises not belonging to a railroad company. But with regard to the dangers arising from the use of steam or of the carrier's vehicle at such places, the carrier's obligation is for extraordinary care; because, as to these, he stands upon a different footing from the ordinary owner of premises not used for dangerous purposes.

§ 502. Liability, in cases of divided ownership. — Mere ownership of a vehicle, used by others as common carriers, does not involve any liability for the negligence of such carriers;¹ and the same principle applies to the mere owner of the track upon which cars are run. Either would be responsible for his own negligence in constructing or maintaining the vehicle or track, but not as a common carrier.² But while a carrier by coach on an ordinary highway is not responsible for defects in the highway,³ a carrier by railroad cars is responsible not only for defects in the cars which he owns or hires,⁴ but also for defects in the track over which the cars run, even though he neither owns nor controls it.⁵ The distinction lies in the fact that the rails are practically a part of the wheels of such a car. And if, instead of furnishing motive power himself, he contracts with another to do so, he is none the less responsible for negligence in the management thereof.⁶ And, on the other hand, a company owning the track, and drawing the cars of another company over it, is also liable to passengers in those cars for negligence, whether in the management of that work or in the maintenance of the track⁷ and the regular approaches thereto, though the latter were constructed by another corporation for

¹ *Gulzoni v. Tyler*, 64 Cal. 334; 30 Pac. 981.

² Cases cited under § 413, *ante*.

³ See § 499, *ante*.

⁴ *Fletcher v. Boston, etc. R. Co.*, 1 Allen, 9.

⁵ *Peters v. Rylands*, 20 Pa. St. 497. See *Edgerton v. Harlem R. Co.*, 35 Barb. 193, 389; *aff'd*, 39 N. Y. 227.

⁶ The owners of cars used upon a railroad belonging to the state are liable as common carriers for an in-

jury to a passenger occasioned by a collision of their trains, though the motive power of the road was furnished by the state, under the control of its agents, through whose negligence the accident happened (*Peters v. Rylands*, 20 Pa. St. 497). Compare *Sprague v. Smith*, 29 Vt. 421, which is sometimes cited as *adverse*.

⁷ *Schopman v. Boston, etc. R. Co.*, 9 Cush. 24.

its sole use.⁸ The oldest American railroad companies were required to permit all persons to use their tracks for independent trains, upon payment of tolls.⁹ But where, as is now the universal rule, the charter gives to the company the exclusive use of its own tracks and authorizes no divided use of the franchise, such a company cannot relieve itself from full responsibility to the public for all the uses of its tracks which it permits. Such a company is, therefore, the carrier of all passengers over its road, even though they travel in a train belonging to and solely managed by another company, using the road by permission of its owner.¹⁰ Still more clearly is it responsible for injuries suffered by passengers in its own cars from the negligence of the other company.¹¹ But it is otherwise where the company in fault uses the track of the other company by virtue of statutory powers.¹² Obviously, the fact that one, who undertakes to carry passengers, does not own either the cars or the track, is immaterial.¹³ A company leas-

⁸ Where plaintiff was at defendant's depot to take defendant's train and fell, in the darkness, down some stairs on defendant's premises and under its control, defendant was held liable, though the stairs had been constructed by an express company for its sole use (*Beard v. Connecticut, etc. R. Co.*, 48 Vt. 101).

⁹ Such appears still to be the charter of the Reading Company and some others.

¹⁰ Where the appellant company permitted another company to run its trains over the road, and an accident happened to one of such trains through a neglect of the latter company, held, the former company was liable to a passenger on such train. A company holding the franchise, and exclusive right, to operate a road, must so use it as not to endanger passengers or property, whether the use be by themselves or others they may permit to use the road, and if they permit another company to run their track, and injury grows out of negligence of the

use of the road thus authorized, the company owning the road and franchise will also be liable (*Peoria, etc. R. Co. v. Lane*, 83 Ill. 448). To the same effect, *Macon, etc. R. Co. v. Mayes*, 49 Ga. 355; *Ricketts v. Chesapeake, etc. R. Co.*, 33 W. Va. 433; 10 S. E. 801; *Chollette v. Omaha, etc. R. Co.*, 26 Neb. 159; 41 N. W. 1106. s. p., as to road operated by a construction company (*Cogswell v. West St. R. Co.*, 5 Wash. St. 46; 31 Pac. 411; *Chattanooga R. Co. v. Liddell*, 85 Ga. 482; 11 S. E. 853; *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600; 5 So. 353). See other cases cited under §§ 120*a*, and 413, *ante*.

¹¹ *Railroad Co. v. Barron*, 5 Wall. 90. See *McElroy v. Nashua, etc. R. Co.*, 4 Cush. 400.

¹² *Wright v. Midland R. Co.*, L. R. 8 Exch. 137.

¹³ *Hannibal, etc. R. Co. v. Martin*, 111 Ill. 219. See *Washington, etc. R. Co. v. Brown*, 17 Wall. 455 [railroad run on the joint account of a receiver of part of it and

ing a railroad is held under a Massachusetts statute not responsible for the death of a passenger, caused by defects in the road-bed which it neither knew nor could by due care have ascertained.¹⁴

§ 503. **Accidents beyond carrier's line.** — A carrier who receives fare and gives a single ticket for a station beyond his own route, or otherwise agrees to carry to that point, is liable for injuries suffered by the passenger at any part of the journey, through the negligence of persons in charge of the means of conveyance, whether such persons are employed by the original carrier,¹ or by another corporation or individual.² The contract in such case is for the entire journey; and the passenger has a right to hold the carrier to whom he paid his fare responsible for his safety through the whole distance.³ The

the lessees of the remaining part, and the tickets were issued in the name of the corporation in the same form as before the road was leased; held, corporation liable to a passenger improperly expelled]; *Foulkes v. Metropol. Dist. R. Co.*, L. R. 5 C. P. D. 157; *Little v. Dusenberry*, 46 N. J. Law, 614.

¹⁴ *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478; 20 N. E. 103.

¹ *Birkett v. Whitehaven, etc. R. Co.*, 4 Hurlst. & N. 730. The contracting carrier has been held responsible (*Cary v. Cleveland, etc. R. Co.*, 29 Barb. 35; *De Rutte v. N. Y., Albany, etc. Tel. Co.*, 1 Daly, 547; *Buffit v. Troy & Boston R. Co.*, 36 Barb. 420); and so has the carrier actually in fault (*Baldwin v. United States Tel. Co.*, 1 Lans. 125). See § 505, *post*. A carrier, who was a part owner of all the lines of conveyance, was held liable for the default of any of them, upon proof of an agreement upon his part for the whole distance, although he gave a separate ticket for each line (*Quimby v. Vanderbilt*, 17 N. Y. 306; *Williams v. Vanderbilt*, 28 Id. 217; *Watkins v. Pennsylvania R. Co.*, 21

D. C. 1). The carrier may restrict liability to its own line (*Kerrigan v. South Pac. R. Co.*, 81 Cal. 248; 22 Pac. 677).

² *Thomas v. Rhydney R. Co.*, L. R. 5 Q. B. 226; *aff'd*, 6 Q. B. 266; *Railroad Co. v. Harris*, 12 Wall. 65; *Great Western R. Co. v. Blake*, 7 Hurlst. & N. 987; *Buxton v. Northeastern R. Co.*, L. R. 3 Q. B. 549; and see *Illinois Central R. Co. v. Copeland*, 24 Ill. 332; *Candee v. Penn. R. Co.*, 21 Wisc. 582; *Wheeler v. San Francisco, etc. R. Co.*, 31 Cal. 46; *Young v. Pennsylvania Co.*, 115 Pa. St. 112; 7 Atl. 741. A railroad company contracting to carry a passenger beyond the limit of its own line is liable for the wrongful ejection of the passenger by the servants of a connecting line (*Cherry v. Kansas City, etc. R. Co.*, 1 Mo. App. 253).

³ While a railroad company cannot be compelled to transport beyond its termini, it is well settled that it may lawfully contract to carry passengers and property, over its own and other lines, to a destination beyond its route; and when such a contract is made it assumes all the obligations of a carrier over the con-

subsequent carriers are to be deemed agents of the first, so far as the rights of the passengers against the first are concerned.⁴ In England, the mere acceptance of passengers or goods for a journey beyond the carrier's line is held sufficient to bind the carrier for the entire distance.⁵ Otherwise in Vermont, Massachusetts and Connecticut;⁶ though even in those states, if a carrier expressly contracts to carry to a destination beyond the terminus of his own road, he thereby becomes answerable for negligence on any connecting road.⁷ The carrier actually in fault may always be held liable to an injured passenger, no matter who issued the ticket.⁸

§ 504. Limitation of liability by notice or contract. — A mere notice on the part of the carrier that he will not be liable for injuries to passengers, even though brought to their knowledge, has no effect upon their rights,¹ unless, by some act upon their part, other than merely making the journey under the

necting lines as well as its own (Atchison, etc. R. Co. v. Roach, 35 Kans. 740; 12 Pac. 93).

⁴ Defendant issued round-trip excursion tickets to a point on a connecting line. The excursion train was, by contract between defendant and the connecting line, to be taken over the road of the latter by its engine, and in charge of its employees. Held, that such employees were *pro hac vice* defendant's employees, and defendant was liable for injuries to a passenger caused by their negligence on the connecting line (Washington v. Raleigh, etc. R. Co., 101 N. C. 239; 7 S. E. 789).

⁵ The principle was settled, after three appeals, upon a case founded upon loss of goods (Bristol, etc. R. Co. v. Collins, 7 H. L. Cas. 194; 5 Hurlst. & N. [Am. ed.] 969; rev'g s. c., 1 Hurlst. & N. 517; and aff'g s. c., 11 Exch. 790; Coxon v. Great Western R. Co., 5 Hurlst. & N. 274). Although these cases are overruled in New York, so far as they hold a carrier of goods, who

makes no special contract, liable beyond his own route (Root v. Great Western R. Co., 45 N. Y. 524), the effect of a single ticket, as a through contract, is not qualified.

⁶ Nutting v. Conn. River R. Co., 1 Gray. 502; Farmers' Bank v. Champlain Transp. Co., 23 Vt. 186; Hood v. New Haven R. Co., 22 Conn. 1.

⁷ Feital v. Middlesex R. Co., 109 Mass. 398; Newell v. Smith, 49 Vt. 255.

⁸ Baldwin v. U. S. Tel. Co., 1 Lans. 125; Southern Express Co. v. Shea, 38 Ga. 519; Atchison, etc. R. Co. v. Roach, 35 Kans. 740; 12 Pac. 93; Southern Express Co. v. Thornton, 41 Miss. 216.

¹ So held, even where the notice was printed upon the passenger's ticket (Rawson v. Penn. R. Co., 2 Abb. N. S. 220; Flinn v. Phil. Wilma., etc. R. Co., 1 Houst. 469). See Bissell v. N. Y. Central R. Co., 25 N. Y. 443; Southern Express Co. v. Newby, 36 Ga. 635; Central R. Co. v. Combs, 70 Id. 533; Potter v. The Majestic, 56 Fed. 244.

carrier's charge, they make it the foundation of a special contract. Thus, a railroad company cannot relieve itself from its liability for a negligent detention, by a notice to that effect on the time-table,² nor by a notice of exoneration endorsed on the passenger's ticket.³ And a common carrier, being under a legal obligation to take all passengers that offer themselves, cannot insist upon their assent to any special contract as a condition of receiving them,⁴ nor escape from liability for his negligence, even by an agreement with them, unless such agreement has all the essential elements of a lawful contract, of which the foremost is a consideration. If a passenger pays the usual fare for the usual accommodations, and there is no special consideration shown, his consent to the carrier's restriction of liability is not binding upon him. Nor will carriers be allowed to evade this rule by pretending that their usual fare is reduced by a general usage to make contracts exempting them from liability. A carrier, attempting to enforce a special contract against a passenger who paid the same fare as the mass of passengers, must at least show that the difference between the rate of fare which would and that which would not deprive him of redress, in case of injury, had been brought under his notice. The passenger himself must make such a contract, to give it any effect. A servant, traveling free, in the service of his master, is not bound by his master's agreement to exempt the carrier.⁵

§ 505. Validity of restrictions on liability. —There can be no question that a contract exempting a carrier from liability for his own fraud or willful violence would be void as against public policy. And it may be safely assumed that a contract exempting a carrier of persons from liability for his own negligence would also be held void.¹ But the validity of a contract

² *Buckmaster v. Great Eastern R. Co.*, 23 L. T. N. S. 471.

³ *Henderson v. Stevenson*, 2 L. R. Sc. App. 470.

⁴ See *Southern Express Co. v. Moon*, 39 Miss. 822.

⁵ So held, as to express messengers (*Brewer v. N. Y., Lake Erie, etc. R. Co.*, 124 N. Y. 59; 26 N. E. 324;

Kenney v. N. Y. Central R. Co., 125 N. Y. 422; 26 N. E. 626).

¹ See *Smith v. N. Y. Central R. Co.*, 24 N. Y. 222, per *Smith, J.* A carrier of passengers cannot stipulate against liability for its own negligence (*Jones v. St. Louis, etc. R. Co.*, 125 Mo. 666; 28 S. W. 883).

exempting a carrier of persons from liability for negligence on the part of his servants has been the subject of much dispute, and the occasion of conflicting decisions. In New York, it has been held, by a closely divided court, that such a contract, when made in consideration of a total² or partial³ abatement of the usual fare, is valid. And so it is held in Maine, Massachusetts, New Jersey, Louisiana, Washington, England and Upper Canada.⁴ In Pennsylvania, Ohio, Illinois and England a contract exempting a common carrier from liability for the gross negligence of servants is void;⁵ but for any less degree,

² So held in the case of a passenger riding on a free pass, containing a contract to that effect, which he had signed (*Wells v. N. Y. Central R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. Central R. Co.*, Id. 196). The condition of exemption from liability in a pass issued to an employee should not be enforced unless the contract was made for a good consideration. (*Pendergast v. Union R. Co.*, 10 N. Y. App. Div. 207; 41 N. Y. Supp. 927).

³ So held where a drover who paid freight for his cattle, received a free pass for himself to look after his cattle, and was therefore considered to be not strictly a free passenger (*Bissell v. N. Y. Central R. Co.*, 25 N. Y. 442; s. c., 29 Barb. 602). This case was argued three times, the court being equally divided, until after the last argument, when five judges concurred, three still dissenting. To the same effect, *Boswell v. Hudson River R. Co.*, 5 Bosw. 699; and reaffirmed in *Poucher v. N. Y. Central R. Co.*, 49 N. Y. 263.

⁴ So held in *Maine* (*Rogers v. Kennebec Stmb. Co.*, 86 Me. 261; 29 Atl. 1069). So in *Massachusetts*, under an absolutely free pass (*Quimby v. Boston, etc. R. Co.*, 150 Mass. 365; 23 N. E. 205); or in consideration of being allowed to ride in a baggage car, though his being in

the baggage car did not contribute to the injury (*Hosmer v. Old Colony R. Co.*, 156 Mass., 506; 31 N. E. 652; *Bates v. Old Colony R. Co.*, 147 Mass. 255; 17 N. E. 633 [express messenger]). So in *New Jersey* (*Kinney v. Central R. Co.*, 34 N. J. Law, 273); *Louisiana* (*Higgins v. New Orleans, etc. R. Co.*, 28 La. Ann. 133); *Washington* (*Muldoon v. Seattle R. Co.*, 10 Wash. 311; 38 Pac. 995 [free pass with conditions thereon]), and *England* (*Gallin v. London & Northw. R. Co.*, L. R. 10 Q. B. 212); *Upper Canada* (*Sutherland v. Great Western R. Co.*, 7 Upp. Can. [C. P.] 409).

⁵ *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Cleveland, etc. R. Co. v. Curran*, 19 Ohio St. 1. In each of these cases, a drover, paying for the conveyance of his cattle but having a free pass for himself, made an agreement exonerating the company from liability for negligence. Held, that the drover was not a free passenger and that the company remained liable for the gross negligence of its servants. The New York decisions were reviewed and condemned. See also *American Express Co. v. Sands*, 55 Pa. St. 140; *Farnham v. Camden, etc. R. Co.*, Id. 53. In *Illinois*, a clearly gratuitous passenger accepted a pass exempting the company from all liability for negligence. Held, that he could re-

it is valid in Illinois.⁶ In the Federal courts, and in Connecticut, Indiana, Wisconsin, Iowa, Missouri, Texas, Utah and other states, it is held that such a contract as to any degree of negligence is void, at least against a passenger giving any compensation for his journey; because it tends to cheapen human life, and to remove the most efficient guaranty which the common law has given to society against the destruction of its members by negligence.⁷ Our own judgment coincides with the latter decisions. The state has an interest of the highest degree in the preservation of its citizens' lives; and experience

cover for gross negligence, though not for any lower degree. And *semble*, an exemption from liability for gross negligence would be void (Illinois Central R. Co. v. Read, 37 Ill. 484). In England, the subject of contracts between common carriers of goods and their customers is regulated by a statute (17 & 18 Vict. c. 31), which permits only such contracts as are reasonable. A contract exempting a railway company from liability for the gross negligence of its servants has been held unreasonable, within the meaning of this statute, and therefore void (McManus v. Lancashire, etc. R. Co., 4 Hurlst. & N. 327; Simons v. Great Western R. Co., 18 C. B. 805). But no such protection has yet been given to passengers. In New York, it is held that a contract exempting a carrier from liability for his servants' "negligence" includes gross negligence (Bissell v. N. Y. Central R. Co., 25 N. Y. 442).

⁶ A stipulation in a free pass that the railway company shall only be liable for gross negligence is valid (Chicago, etc. R. Co. v. Hawk, 36 Ill. App. 327).

⁷ The U. S. Supreme Court, after a thorough review of the whole question, declared its conclusions to be: "First, that a common carrier cannot lawfully stipulate for exemption

from responsibility, when such exemption is not just and reasonable in the eye of the law. Secondly, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. Thirdly, that these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. That a drover traveling on a pass such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire (N. Y. Central R. Co. v. Lockwood, 17 Wall. 357). The same ruling is adopted in *Indiana* (Louisville, etc. R. Co. v. Faylor, 126 Ind. 126; 25 N. E. 869; Ohio, etc. R. Co. v. Selby, 47 Ind. 471); *Connecticut* (Camp v. Hartford, etc. Stmb. Co., 43 Conn. 33); *Wisconsin* (Davis v. Chicago, etc. R. Co., 93 Wisc. 470; 67 N. W. 16); *Iowa* (Rose v. Des Moines, etc. R. Co., 39 Iowa, 246; Solan v. Chicago, etc. R. Co., 95 Iowa, 260; 63 N. W. 692; Code, § 1308); *Missouri* (Tibby v. Mo. Pac. R. Co., 82 Mo. 292; Bryan v. Missouri Pac. R. Co., 32 Mo. App. 228); *Texas* (Missouri Pac. R. Co. v. Ivy, 71 Tex. 409; 9 S. W. 346); *Utah* (Saunders v. Southern Pac. R. Co., 13 Utah, 275; 44 Pac. 932).

demonstrates that there is no practical safeguard against the destruction of those lives by negligence, except in private actions by the persons injured, or their representatives. The protection thus afforded to the individual is, therefore, of such value to the state that it should not allow it to be waived. But, even where such contracts are permitted, yet in order that such a contract should exempt the carrier from liability for negligence, the passenger must expressly assume the risk, or its terms must otherwise be clear and unmistakable to that effect;⁸ and a stipulation that the carrier "assumes no liability whatsoever" in the matter is not sufficient.⁹ Such a contract will be closely restricted in its operation,¹⁰ and will not be allowed to take effect, so as to exempt the carrier, until the relation of carrier and passenger begins. Thus one is not a passenger, "riding free," before the train is formed which is to carry him.¹¹ On the same principle, contracts for exemption from liability for injury to property have been strictly construed against the carrier, so as not to take effect until actual transportation has begun; it being a general rule that contracts, not clear in their meaning,¹² by which common carriers seek to avoid the responsibility which the law imposes upon them, shall be construed most strongly against them.

§ 506. Approaches, accommodations, etc.*—The carrier's obligations are not confined to the precise act of carrying; although his severe responsibilities do not extend to all incidental matters.¹ He must use at least ordinary care in all preliminary matters, such as the reception of his passengers into the vehicle, their accommodation while waiting for it,² and

⁸ *Porter v. N. Y., Lake Erie, etc. R. Co.*, 59 Hun, 177; 13 N. Y. Supp. 491.

⁹ *Blair v. Erie R. Co.*, 66 N. Y. 313.

¹⁰ *Kenney v. N. Y. Central R. Co.*, 125 N. Y. 422; 26 N. E. 626.

¹¹ *Stinson v. N. Y. Central R. Co.*, 32 N. Y. 333.

¹² *St. Louis, etc. R. Co. v. Smuck*, 49 Ind. 302.

* This section has been almost entirely changed.

¹ See § 501, *ante*.

² Many illustrations are given in subsequent notes. A charge requiring *great* care in such cases was held to be correct in *Allender v. Chicago, etc. R. Co.*, 43 Iowa, 276; *s. p.*, *Warren v. Fitchburg R. Co.*, 8 Allen, 227. But see § 501, *ante*. Where a company induces an unusual crowd to collect at its stations, it is bound to use such means as are reasonably necessary to prevent injury from the conduct or pressure of the crowd (*Taylor v. Pennsylv.*

the repair of all ways kept by the carrier for the use of passengers going to or coming from the vehicle,³ whether such ways lie over his own property, or he has only a license to use them.⁴ He is liable for any defects or obstacles which, being left by his want of ordinary care in the path of a passenger on his way to or from the conveyance, cause an injury to him.⁵ A railroad company (or other carrier controlling the means of access or exit) must use ordinary care to provide safe methods of access to and departure from its vehicles, at such points as it invites such access or departure.⁶ It must, therefore, use

vania Co., 50 Fed. 755). See further, on waiting for train, *Martin v. Columbia, etc. R. Co.*, 32 S. C. 592; 10 S. E. 960. If the station-room is full, or if it is so offensive by reason of smoke, that a passenger has good reason for not remaining there, it will justify his endeavor to enter the cars at as early a period as possible, and if in doing so he receives an injury from the unsafe condition of the platform or steps, in a place where passengers would naturally go, the company is liable (*McDonald v. Chicago, etc. R. Co.*, 26 Iowa, 124).

³ *Knight v. Portland, etc. R. Co.*, 56 Me. 234; *Liscomb v. New Jersey R. Co.*, 6 Lans. 75; *Parker v. Boston, etc. St'boat Co.*, 109 Mass. 449.

⁴ Thus, where a carrier by steamboat uses an old hulk, not belonging to him, as a mode of access to his vessel, he is liable to a passenger for the bad condition of the hulk (*John v. Bacon*, L. R. 5 C. P. 437). The carrier may be responsible for the condition of a way, not its own, which passengers use without warning (*Delaware, etc. R. Co. v. Trautwein*, 52 N. J. Law, 169; 19 Atl. 178; *Missouri Pac. R. Co. v. Long*, 81 Tex. 253; 16 S. W. 1016). Where a railroad company erected and maintained an approach to its boat landing, the fact that it was maintained in a public street does not relieve the company from liability (*Skot-*

towe v. Oregon, etc. R. Co., 22 Oreg. 430; 30 Pac. 222).

⁵ *Sargent v. St. Louis, etc. R. Co.*, 114 Mo. 348; 21 S. W. 823 [mail bags]; *Hughes v. Chicago, etc. R. Co.*, 127 Mo. 447; 30 S. W. 127 [same]; *Ohio, etc. R. Co. v. Simms*, 43 Ill. App. 260 [same].

⁶ *Boyce v. Manhattan R. Co.*, 118 N. Y. 314; 23 N. E. 304. It is the duty of a railroad company to provide a safe place at which passengers can embark upon and depart from the train at such points as the company receives or discharges passengers (*Redner v. Lehigh, etc. R. Co.*, 73 Hun, 562; 26 N. Y. Supp. 1050; *Texas, etc. R. Co. v. Brown*, 78 Tex. 397; 14 S. W. 1034). And where a railroad company receives passengers from a space between parallel tracks it is bound to provide such safeguards as will protect the passengers in the exercise of ordinary care from injury from passing trains (*Union Pac. R. Co. v. Sue*, 25 Neb. 772; 41 N. W. 801). But one who takes passage over an unfinished railroad knowing that there are no station facilities, cannot recover for injuries resulting solely from that fact (*Chicago, etc. R. Co. v. Frazer*, 55 Kans. 582; 40 Pac. 923). See *Jones v. Baltimore, etc. R. Co.* 21 D. C. 346 [duty to furnish station with signs, to direct passengers to trains].

ordinary care to properly construct⁷ stations, platforms, stairs, etc., and keep them in good and safe condition for use,⁸ properly lighted⁹ and heated,¹⁰ and free from obstructions,¹¹ slip-

⁷ Platforms should not, without necessity, be so built as to leave a dangerous space between the cars and the platform (*Boyce v. Manhattan R. Co.*, 118 N. Y. 314; 23 N. E. 304; *Missouri Pac. R. Co. v. Long*, 81 Tex. 253; 16 S. W. 1016); nor so close to the cars that the latter will project over the platform, so as to strike persons upon it (*Dobiecki v. Sharp*, 88 N. Y. 203; *Archer v. N. Y., New Haven, etc. R. Co.*, 106 N. Y. 589; 13 N. E. 318). But curves are necessary in the construction of an elevated railroad; and when necessary for public convenience, it is proper to construct a station thereon, although it necessitates an open space between the station and the platform of a car stopping thereat; and where such space (in this case eight inches) does not exceed what is necessary, making proper allowance for the oscillation of the cars, its existence does not charge the company with negligence (*Ryan v. Manhattan R. Co.*, 121 N. Y. 126; 23 N. E. 1131). Guards should be provided, at the ends of highly elevated platforms (*Jarvis v. Brooklyn El. R. Co.*, 133 N. Y. 623; 30 N. E. 1150; see *Louisville, etc. R. Co. v. Treadway*, 143 Ind. 689; 40 N. E. 807; 41 Id. 794).

⁸ *Pennsylvania Co. v. Marion*, 123 Ind. 415; 23 N. E. 973. A passenger may assume that a platform is safe (*Archer v. N. Y., New Haven, etc. R. Co.*, 106 N. Y. 589; 13 N. E. 313; *Louisville, etc. R. Co. v. Lucas*, 119 Ind. 583; 21 N. E. 968). Company held liable for holes in platforms (*Ohio, etc. R. Co. v. Stransberry*, 132 Ind. 533; 32 N. E. 218; *Louisville, etc. R. Co. v. Wolfe*, 80 Ky. 82; *Tobin v. Portland, etc. R. Co.*, 59

Me. 183); or in a wharf (*Knight v. Portland, etc. R. Co.*, 56 Me. 234); or in the grounds (*Hurlbert v. N. Y. Central R. Co.*, 40 N. Y. 145; *McKone v. Mich. Central R. Co.*, 51 Mich. 601).

⁹ *Louisville, etc. R. Co. v. Treadway*, 143 Ind. 689; 40 N. E. 807; 41 Id. 794 [passenger fell off unguarded and unlighted platform]; *Jarvis v. Brooklyn El. R. Co.*, 133 N. Y. 623; 30 N. E. 1150 [same]; *Fox v. New York*, 5 N. Y. App. Div. 349; 39 N. Y. Supp. 309; *Alexandria, etc. R. Co. v. Herndon*, 87 Va. 193; 12 S. E. 289; *Wallace v. Wilmington, etc. R. Co.*, 8 Del. 529; 18 Atl. 818; *Fordyce v. Merrill*, 49 Ark. 277; 5 S. W. 329; *Texas, etc. R. Co. v. Brown*, 78 Tex. 397; 14 S. W. 1034; *Bradley v. Grand Trunk R. Co.*, Mich.

; 65 N. W. 102. The company is liable to a passenger who falls from a platform because of insufficient light, though his relation with the company, as a passenger, may have ceased (*Stewart v. International, etc. R. Co.*, 53 Tex. 289; *Patten v. Chicago, etc. Co.*, 32 Wisc. 524; *Buenemann v. St. Paul, etc. R. Co.*, 32 Minn. 390); and to a passenger who, upon the name of his destined station being announced, steps off in the darkness into a culvert which he supposed was the platform (*Columbus, etc. R. Co. v. Farrell*, 31 Ind. 408).

¹⁰ *Texas, etc. R. Co. v. Mays*, 4 Tex. Civ. App. 225; 15 S. W. 43 [neglect to heat station]. This duty exists at common law (*Texas, etc. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125; 30 S. W. 720).

¹¹ *Sargent v. St. Louis, etc. R. Co.*, 114 Mo. 348; 21 S. W. 823 [mail-bag on unlighted platform].

periness¹² and other defects,¹³ so as to avoid any danger to passengers which could be reasonably anticipated.¹⁴ A carrier, making a long journey, must give passengers reasonable time and opportunity to procure necessary meals; and he is responsible for the safety of means of egress to and return from such meals, to the same extent as when originally receiving or finally discharging passengers.¹⁵

§ 507. [consolidated with § 490.]

§ 508. **Negligence in starting and stopping.**—A carrier must allow passengers a reasonable time in which to get on¹

¹² An elevated railroad company was held liable for allowing its stairways to remain for an unreasonable time slippery from fallen snow (*Weston v. N. Y. El. R. Co.*, 73 N. Y. 595; *Timpson v. Manhattan R. Co.*, 52 Hnn, 489; 5 N. Y. Supp. 684; *s. p.*, *Shepherd v. Midland R. Co.* 25 L. T. N. S. 879); but not for merely failing to clean them off every hour, during a continuous snow-storm (*Kelly v. Manhattan R. Co.*, 112 N. Y. 443; 20 N. E. 383).

¹³ *Collins v. Toledo, etc. R. Co.*, 80 Mich. 390; 45 N. W. 178 [loose plank used for want of any step].

¹⁴ This is the proper test (*Falls v. San Francisco, etc. R. Co.*, 97 Cal. 114; 31 Pac. 901; *Cornman v. Eastern Cos. R. Co.*, 4 Hurlst. & N. 781 [weighing machine on platform]; *Cannon v. Midland, etc. R. Co.*, L. R. 6 Ir. App. 199 [passenger pushed from platform by sudden violence of a crowd]).

¹⁵ The company is bound to provide passengers on long routes with easy and safe modes of obtaining food and safe egress and ingress to and from refreshment stations, whether controlled by the company or others, and where a passenger sustains injury on returning from such a station to the train by want

of sufficient light and the removal of the train without notice in his absence, the company is liable (*Peniston v. Chicago, etc. R. Co.*, 34 La. Ann. 777). Though the approaches do not belong to the carrier, he is nevertheless responsible for their condition (*Watson v. Oxanna Land Co.*, 92 Ala. 320; 8 So. 770; *East Tennessee, etc. R. Co. v. Watson*, 94 Ala. 634; 10 So. 228). Where a lunch stand is kept at a railroad station, by authority of the company, which can be approached only over its platform, the company is responsible for its condition to persons passing over it to make purchases (*Dillingham v. Teeling* [Tex. Civ. App.], 24 S. W. 1094).

¹ *Hickenbottom v. Delaware, etc. R. Co.*, 122 N. Y. 91; 25 N. E. 279; *Walters v. Phila. Traction Co.*, 161 Pa. St. 36; 28 Atl. 941; *Steeg v. St. Paul City R. Co.*, 50 Minn. 149; 52 N. W. 393; *Poole v. Georgia Railroad & Banking Co.*, 89 Ga. 320; 15 S. E. 321. The purchase of a ticket gives no right to the passenger except upon the condition of presenting himself for passage before the signal is given for a start, and if he comes after that, it is not negligence as against him that the train starts in obedience to it (*Paulitsch v. N. Y.*

and off;² one who is feeble or infirm is entitled to more than ordinary time for this purpose,³ taking into account also the distance and other difficulties of 'access to the vehicle.⁴ The carrier is responsible for any injury resulting from the slightest motion of his vehicle during the entrance or exit of a passenger,⁵

Central, etc. R. Co., 102 N. Y. 280; 6 N. E. 577). See Texas, etc. R. Co. v. Davidson, 68 Tex. 370; 4 S. W. 636 [plaintiff promised ten minutes by the conductor to check her baggage, and train started before that time expired].

² McDonald v. Long Island R. Co., 116 N. Y. 546; 22 N. E. 1068; Eppendorf v. Brooklyn, etc. R. Co., 69 N. Y. 195; Fairmount, etc. R. Co. v. Stutler, 54 Pa. St. 375; Washington, etc. R. Co. v. Harmon, 147 U. S. 571; 13 S. Ct. 557 [horse-car]; St. Louis, etc. v. Person, 49 Ark. 182; 4 S. W. 755; Louisville, New Orleans, etc. R. Co. v. Mask, 64 Miss. 738; 2 So. 360; Norfolk, etc. R. Co. v. Prinnell [Va.], 3 S. E. 95; Central R. Co. v. Smith, 74 Md. 212; 21 Atl. 706. The duty of a railroad company operating cars without fixed stopping places is not discharged by merely stopping a reasonable time for passengers to alight; but the conductor, before giving the signal to start, must see that no passenger is in the act of alighting, or in a position which would be rendered dangerous by putting the car in motion (Highland Ave. R. Co. v. Burt, 92 Ala. 291; 9 So. 410 [dummy engine]; Birmingham R. Co. v. Smith, 90 Ala. 60; 8 So. 86 [horse-car]). s. p., City R. Co. v. Findley, 76 Ga. 311; Jones v. Texas, etc. R. Co., 47 La. Ann. 383; 16 So. 937; East Line, etc. R. Co. v. Rushing, 69 Tex. 306; 6 S. W. 834; Ft. Worth, etc. R. Co. v. Viney, Tex. Civ. App. ; 30 S. W. 252; Louisville, etc. R. Co. v. Crunk, 119 Ind. 542; 21 N. E. 31; Anderson v. Citizens' R. Co., 12 Ind. App. 194;

38 N. E. 1109; McNulta v. Ensch, 134 Ill. 46; 24 N. E. 631; Chicago, etc. R. Co. v. Mills, 105 Ill. 63; Chicago, etc. R. Co. v. Drake, 33 Ill. App. 114; Owens v. Kansas City, etc. R. Co., 95 Mo. 169; 8 S. W. 350 [passenger pulled off by brakeman]; Ridenhour v. Kansas City R. Co., 102 Mo. 270; 13 S. W. 889; 14 Id. 760; Carr v. Eel River, etc. R. Co., 98 Cal. 366; 33 Pac. 213; Raub v. Los Angeles R. Co., 103 Cal. 473; 37 Pac. 374). And passengers have a right to assume that the car will not be started without ascertaining whether any passenger is alighting (Britton v. Grand Rapids R. Co., 90 Mich. 159; 51 N. W. 276).

³ Colt v. Sixth Ave. R. Co., 33 N. Y. Superior, 189; aff'd, 49 N. Y. 671; Bonney v. Bushwick R. Co., 1 How. Pr. N. S. 66; Holmes v. Allegheny Tr. Co., 153 Pa. St. 152; 25 Atl. 640.

⁴ Allender v. Chicago, etc. R. Co., 43 Iowa, 276.

⁵ So held, where a passenger was getting on (Morrison v. Broadway R. Co., 130 N. Y. 166; 29 N. E. 105; Akersloot v. Second Ave. R. Co., 131 N. Y. 599; 30 N. E. 195; Sahlgaard v. St. Paul R. Co., 48 Minn. 232; 51 N. W. 111). So also, where a passenger was getting off (Baker v. Manhattan R. Co., 118 N. Y. 533; 23 N. E. 885 [conductor signaled to start at the same instant that he opened the gate for a passenger to alight]; Mulhado v. Brooklyn, etc. R. Co., 30 N. Y. 370 [horse-car]; Roberts v. Johnson, 58 Id. 613 [stage]; Poulin v. Broadway, etc. R. Co., 61 Id. 621 [horse-car]; Crissey v. Hestonville, etc. R. Co., 75 Pa. St.

unless such motion was caused entirely without his fault,⁶ or unless he had no notice of the passenger's movement, and was not in fault for not observing it.⁷ As soon as a passenger has fairly entered the vehicle, the carrier may start, without waiting for him to reach a seat, unless there is some special reason for doing so, as in the case of a weak or lame person, or of a passenger on the outside of a coach.⁸ And the ground

83; *Pennsylvania R. Co. v. Lyons*, 129 Id. 113; 18 Atl. 759; *Hill v. West End R. Co.*, 158 Mass. 458; 33 N. E. 532 [street-car]; *Bradley v. Ft. Wayne, etc. R. Co.*, 94 Mich. 35; 53 N. W. 915 [street-car]; *Kentucky, etc. Bridge Co. v. Quinkert*, 2 Ind. App. 244; 28 N. E. 338; *Birmingham R. Co. v. Hale*, 90 Ala. 8; 8 So. 142; *Conway v. New Orleans, etc. R. Co.*, 46 La. Ann. 1429; 16 So. 362; *Texas, etc. R. Co. v. Miller*, 79 Tex. 78; 15 S. W. 264 [greatest care required]). It is the duty of a carrier not only to provide safe and convenient means of entering and leaving cars, but to stop when the passenger is about to alight, and not to start until he has alighted (*Washington, etc. R. Co. v. Harmon*, 147 U. S. 571; 13 S. Ct. 557.)

⁶ *Schreiber v. Twenty-third St. R. Co.*, 27 N. Y. Weekly Dig. 192. But the jury must still find negligence (*West End, etc. R. Co. v. Mozely*, 79 Ga. 463; 4 S. E. 324). After plaintiff has proved that the accident was caused by a sudden movement of a car from which she was alighting, it is for defendant to prove that it was not responsible for the movement (*Martin v. Second Ave. R. Co.*, 3 N. Y. App. Div. 448; 38 N. Y. Supp. 220). Where a passenger attempting to enter a street-car is injured by reason of the premature starting of the car, the fact that the signal for starting was given by some unauthorized person does not exempt the car company from liability, pro-

vided the conductor could, by the use of due care and diligence, have countermanded the signal in time to have prevented the injury (*North Chicago R. Co. v. Cook*, 145 Ill. 551; 33 N. E. 958).

⁷ The carrier is entitled to this notice (*Nichols v. Middlesex R. Co.*, 106 Mass. 463). The carrier is not liable if he exercised due watchfulness to see or hear persons who wished to board the car, and, so doing, did not see or hear the plaintiff (*Lamline v. Houston, etc. R. Co.*, 14 Daly, 144). s. p., *Losee v. Water-vliet R. Co.*, 63 Hun, 404; 18 N. Y. Supp. 297; *Atlanta, etc. R. Co. v. Dickerson*, 89 Ga. 455; 15 S. E. 534; *Chesapeake, etc. R. Co. v. Reeves* [Ky.], 11 S. W. 464). But the fact that the conductor did not know that the passenger intended to leave the car, and did not see him leaving, will not furnish company with an excuse for not giving him a reasonable time to go from the train, unless he was so situated as to conceal himself from observation (*McDonald v. Long Island R. Co.*, 116 N. Y. 546; 22 N. E. 1068). For the carrier must use at least ordinary care to see whether passengers are coming on or going off (*Cawfield v. Asheville R. Co.*, 111 N. C. 597; 16 S. E. 703 [street-car]).

⁸ The text was quoted, approved and applied in *Yarnell v. Kansas City, etc. R. Co.*, 113 Mo. 570; 21 S. W. 1. s. p., *Black v. Third Ave. R. Co.*, 2 N. Y. App. Div. 387; 37 N. Y. Supp. 830 [no evidence that unnecessary

of the exception must be brought to the carrier's notice, or he will be justified in starting in the usual manner. The carrier must also use prudence in starting, and must not set off⁹ or stop¹⁰ with a sudden and violent jerk, if it can be avoided with due care.¹¹ A passenger has a right to expect that a train will stop for the usual length of time at a station, and has a right to use such deliberation, in entering or leaving the car,

or unusual force was applied]. But when a passenger enters a car, in which there is only standing room, he should have time to take hold of a strap, or otherwise steady himself, before the car starts (*Dougherty v. Missouri R. Co.*, 81 Mo. 325).

⁹ *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131; *Milliman v. N. Y. Central R. Co.*, 4 Hun, 409; *aff'd*, 66 N. Y. 642; *Lucas v. New Bedford R. Co.*, 6 Gray, 64; *Dudley v. Front St. R. Co.*, 73 Fed. 128. Where plaintiff was told by the porter of the train to go forward two cars at the next station, and, after plaintiff started, the train started, jerking her off the platform, company held liable (*Smith v. Chicago, etc. R. Co.*, 108 Mo. 243; 18 S. W. 971). Without evidence that the jerk was not such as is usual in stopping and starting trains under ordinary circumstances there can be no recovery (*Choate v. San Antonio, etc. R. Co.*, 90 Tex. 82; 36 S. W. 247). The burden of proving a negligent starting of the car rests on plaintiff (*Schultz v. Second Ave. R. Co.*, 12 N. Y. App. Div. 445; 42 N. Y. Supp. 710). See *Boikens v. New Orleans, etc. R. Co.*, 48 La. Ann. 831; 19 So. 737 [standing on car steps while alighting].

¹⁰ While defendant's ferry-boat, on which plaintiff was a passenger, was attempting to enter its slip, it struck the side. Plaintiff then rose from his seat, when it struck again, causing him to fall and break his leg;

question for jury (*Snelling v. Brooklyn & N. Y. Ferry Co.*, 59 Hun, 619; 13 N. Y. Supp. 398). A railroad company is bound to take notice that passengers intending to leave the train at a station will be engaged in preparation to leave, and may be upon their feet for that purpose, and whether it was negligent to suddenly and without warning jerk the train at that time should be submitted to the jury (*Miles v. N. Y., Lake Erie, etc. R. Co.* 18 N. Y. App. Div. 41; 42 N. Y. Supp. 379).

¹¹ The act of an engineer in letting on more steam than is actually necessary to start a train, which has been stopped too soon before its arrival at the station, by which means the jerking motion of the train is increased, is not negligence, provided the engineer exercises a reasonable discretion in the matter (*Chicago, etc. R. Co. v. Hazzard*, 26 Ill. 373). The plaintiff must show that the jerk was attributable to some negligent act of defendant (*Stager v. Ridge Av. R. Co.*, 119 Pa. St. 70; 12 Atl. 821). A complaint, which avers that the conductor negligently caused the train to move, jerking plaintiff to the ground, is sufficient; the conductor, while in charge, being the agent of the company so far as concerns the rights of parties alighting from the train (*Louisville, etc. R. Co. v. Wood*, 113 Ind. 544; 16 N. E. 197).

as that time would allow.¹² If, without sufficient notice to the passengers, the train suddenly starts, before the usual time has elapsed, a passenger injured thereby may recover damages.¹³ But if any passenger needs an unusual time to get off, by reason of physical infirmity, he must notify the conductor of the fact.¹⁴ The conductor of a railroad train ought to announce the name of each station, in time to give passengers a reasonable opportunity to prepare for departure, and must keep the train in waiting, after such announcement, long enough to enable passengers, using due diligence, to leave it safely.¹⁵ But this rule does not extend to street cars, stopping at any street.¹⁶

§ 509. Duty to passengers alighting. — A railroad company having stations, is bound to stop for a reasonable time, at all stations for which tickets have been issued,¹ and at the

¹² *Bartholomew v. N. Y. Central R. Co.*, 102 N. Y. 716; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; and see *Mitchell v. Western, etc. R. Co.*, 30 Ga. 22; *Texas, etc. R. Co. v. Miller*, 79 Tex. 78; 15 S. W. 264; *Atchison, etc. R. Co. v. Frier* [Tex. Civ. App.], 22 S. W. 6 [sudden motion of train while plaintiff was alighting therefrom, after being carried past the station].

¹³ So, where the plaintiff claimed that the injury resulted from the cars not stopping at the station a reasonable time for the passengers to leave, which was controverted by the defendant, evidence on the part of the plaintiff to show the usual and customary period of the cars stopping at that place was held admissible (*Fuller v. Naugatuck R. Co.*, 21 Conn. 557).

¹⁴ *New Orleans, etc. R. Co. v. Statham*, 42 Miss. 607.

¹⁵ *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Texas, etc. R. Co. v. Pollard*, 2 Tex. App. Civ. Cas. § 484; *Southern Kans. R. Co. v. Pavey*, 48

Kans. 452; 29 Pac. 593 [premature announcement of arrival at station]. It is error to charge, without qualification, that it was the carrier's duty to give notice that the train was about to start, as such duty is not imposed on it under ordinary circumstances (*N. Y., Chicago, etc. R. Co. v. Woods*, 9 Ohio C. C. 322). But a railroad company is not required to give a signal to passengers on its train before starting from a wood station, where it has stopped to take on wood (*Malcolm v. Richmond, etc. R. Co.*, 106 N. C. 63; 11 S. E. 187). A carrier is not liable for carrying a sleeping passenger beyond his station, notice of arrival and time to alight having been given; it not being its duty to arouse him, and see that he gets off (*Texas, etc. R. Co. v. Alexander* [Tex. Civ. App.], 30 S. W. 1113; and see *Wilson v. New Orleans, etc. R. Co.*, 68 Miss. 9; 8 So. 330).

¹⁶ *Robinson v. Northampton R. Co.*, 157 Mass. 224; 32 N. E. 1.

¹ It is culpable negligence not to stop a train at stations for which

usual and convenient places at such stations where passengers may alight with comfort and safety.² And if it uses cars, the steps of which are elevated much above the ground, it is undoubtedly bound to provide platforms upon which passengers may safely step,³ and which are long enough to accommodate all the cars of an ordinary train, so that a passenger in any car may easily reach the platform. And when a train is longer than the platform, the conductor is bound, upon the request of any passenger, to move the train backward or forward, so as to enable the passenger to step upon the platform.⁴ This is certainly proper in England, where passengers cannot walk through the cars; but in America, where they can, it is held sufficient for the conductor to delay the train until

tickets have been sold, if they are the regular stopping places (*Bucher v. New York Central R. Co.*, 98 N. Y. 128); or even if the place was not a regular station, but the conductors, to defendant's knowledge, were frequently in the habit of stopping and putting off passengers there, and plaintiff had paid the fare to that place (*Hull v. East Line, etc. R. Co.*, 66 Tex. 619). Complaint need not aver that plaintiff knew that the train was scheduled to stop at the station (*Louisville, etc. R. Co. v. Cayce [Ky.]*, 34 S. W. 896). Only a reasonable stop can be required (*Chicago, etc. R. Co. v. Landauer*, 36 Neb. 642; 54 N. W. 976).

² *Onderdonk v. N. Y. & Sea Beach R. Co.*, 74 Hun. 42; 26 N. Y. Supp. 310. A carrier of passengers is bound to afford a passenger a reasonable opportunity to alight at the usual depot, and cannot require him to alight at an unusual place, as a side track or a switch (*White Water R. Co. v. Butler*, 112 Ind. 598; 14 N. E. 599; *Burnham v. Wabash W. R. Co.*, 91 Mich. 523; 52 N. W. 14; *Alabama, etc. R. Co. v. Sellers*, 93 Ala. 9; 9 So. 375; *Samuels v. Richmond, etc. R. Co.*, 35 S. C. 493; 14 S. E.

943 [exemplary damages for willful refusal]). When a train stops at or about the usual time and place after the announcement of a station, a traveler is justified in presuming it is for the discharge of passengers (*McNulta v. Ensich*, 31 Ill. App. 100; *aff'd*, 134 Ill. 46; 24 N. E. 631). See *Richmond, etc. R. Co. v. Smith*, 92 Ala. 237; 9 So. 223 [stopping over trestle]; *Richmond R. Co. v. Scott*, 86 Va. 902; 11 S. E. 404.

³ See *Louisville, etc. R. Co. v. Holsapple*, 12 Ind. App. 301; 38 N. E. 1107; *Illinois Cent. R. Co. v. Hobbs*, 58 Ill. App. 130 [car-step twenty inches above station platform]. Where the rear platform of a car is not at a safe place for passengers to alight, failure on the part of the carrier to warn passengers of that fact is negligence, though it was safe to alight at the front platform (*McDonald v. Illinois Cent. R. Co.*, 88 Iowa, 345; 55 N. W. 102).

⁴ *N. Y., Chicago, etc. R. Co. v. Doane*, 115 Ind. 435; 17 N. E. 912; *Memphis, etc. R. Co. v. Whitfield*, 44 Miss. 466. See *Siner v. Great Western R. Co.*, L. R. 3 Exch. 150; 4 Id. 117.

passengers in cars beyond the platform have time to walk through the cars to the platform.⁵ One or the other thing he must certainly do. And if he refuses to do either, or directs the passenger to alight at once;⁶ or if he cannot be found in time to enable the passenger to make the request; or if the passenger, on a dark night, believes that he has reached the platform,⁷ the company will be liable for injuries sustained by such passenger in cautiously jumping from the car beyond the platform. So, if there is no platform, or a defective one, the company is liable for an injury suffered by a passenger in cautiously descending,⁸ especially if induced to do so by the carrier's servants.⁹ But it has been held that the mere fact of

⁵ So held in *Eckerd v. Chicago, etc. R. Co.*, 70 Iowa, 353; 30 N. W. 615.

⁶ On the arrival of a train, there not being room for all the carriages at the platform, some of the passengers were requested by the company's servants to alight upon the line beyond it, a depth of about three feet. In so alighting, a lady, instead of availing herself of the two steps, jumped from the first step to the ground, and sustained a spinal injury from the concussion. The jury having found the company guilty of negligence in not providing reasonable means of alighting, the court declined to interfere with a verdict for the plaintiff (*Foy v. Brighton, etc. R. Co.*, 18 C. B. N. S. 225). s. p., *Rose v. Northeastern R. Co.*, L. R. 2 Ex. Div. 248; *Pullman Car Co. v. Smith*, 79 Tex. 468; 14 S. W. 993.

⁷ *Columbus, etc. R. Co. v. Farrell*, 31 Ind. 408; *Montgomery, etc. R. Co. v. Boring*, 51 Ga. 582; *McGee v. Missouri, etc. R. Co.*, 92 Mo. 208; 4 S. W. 739; *Central R. Co. v. Van Horn*, 38 N. J. Law, 133. s. p., *Scanlan v. Tenny*, 72 Fed. 225 [light on boat reflected away from gang-plank].

⁸ *Delamatyr v. Milwaukee, etc. R. Co.*, 24 Wisc. 578; *Robson v. North-*

eastern R. Co., L. R. 10 Q. B. 271; *aff'd*, 46 L. J. Q. B. 50; *Weller v. London, etc. R. Co.*, L. R. 9 C. P. 126; *Bridges v. North London R. Co.*, L. R. 7 H. L. 213; *Nicholls v. Great Southern R. Co.*, 7 Ir. Rep. 40; *Thompson v. Belfast, etc. R. Co.*, 5 Id. 517. It is negligence in a railroad company to have a station platform higher than the steps of a passenger car, and to require in consequence that passengers should enter from the platform into a baggage car and thence proceed to the coach assigned to passengers; and where plaintiff, at the conductor's request, entered the baggage car, and while stepping from it to the passenger car, was thrown from the car platform by a sudden jerk of the train and injured, defendant is liable (*Turner v. Vicksburg, etc. R. Co.*, 37 La. Ann. 648).

⁹ So held, where positive directions were given to alight at a dangerous place (*Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168; 11 S. W. 559; *International, etc. R. Co. v. Smith* [Tex.], 14 S. W. 642). So held, where the station had been announced and the night was dark (*Philadelphia, etc. R. Co. v. Edelstein* [Pa.], 16 Atl. 847; *Philadelphia, etc. R. Co. v. McCormick*, 124 Pa. St. 427; 16

the platform being shorter than a particular train, of unusual length, is not evidence of negligence, and that a passenger is not justified in jumping off beyond the platform, upon low ground, without some substantial excuse.¹⁰ If a train is run past a station to a switch, with intent to return to the station, the conductor is bound to give timely notice of this intention to passengers destined for that station.¹¹

§ 510. Duty to assist passengers in getting on and off.—

The obligation of a carrier to assist passengers in getting on and off depends largely upon the nature of his vehicle, the facility with which access may be had without assistance, and similar circumstances. Thus, where a ship lies considerably above the level of the pier, and no plank is run ashore, or where she lies at a distance from the shore, the master, if he has undertaken to carry passengers, is bound to hoist them aboard. So a railway company, stopping its train for passengers at a place so steep or inconvenient that they could not easily get on or off the train, would be bound to assist them to do so.¹

Atl. 848; *Miller v. East Tennessee, etc. R. Co.*, 93 Ga. 630; 21 S. E. 153.

¹⁰ *Siner v. Great Western R. Co.*, L. R. 3 Exch. 150; *aff'd*, 4 Id. 117. In *Thompson v. Belfast, etc. R. Co.* (5 Irish Rep. 517), the plaintiff was allowed to recover upon a state of facts very similar. See *Owen v. Great Western R. Co.*, 46 L. J. Q. B. 486; *Lewis v. London, etc. R. Co.*, L. R. 9 Q. B. 66.

¹¹ Plaintiff was an infant 10 years old; the conductor took plaintiff's fare, and asked him where he was going, but failed to inform him that the train ran past the station for which he was bound, to a switch, and then backed in; the plaintiff did not know these facts; and, on the train passing his station, he became alarmed and jumped off. Held, that defendant was guilty of negligence (*Hemmingway v. Chicago, etc. R. Co.*, 72 Wisc. 42; 37 N. W. 804; see s. c. before 67 Wisc. 668; 31 N. W. 268).

¹ *Memphis, etc. R. Co. v. Whitfield*, 44 Miss. 466. But the company is not in fault for not providing accommodations for passengers at intermediate stations for which they have not taken tickets (*Falkiner v. Great Southern, etc. R. Co.*, 5 Irish Rep. 213). See *McDonald v. Chicago, etc. R. Co.*, 29 Iowa, 170; *Allender v. Chicago, etc. R. Co.*, 43 Id. 276; *State v. Grand Trunk R. Co.* 58 Me. 176. A jury may find that assistance should have been given, where there was no proper place for alighting (*Missouri Pac. R. Co. v. Worthington*, 73 Tex. 25; 10 S. W. 741 [unsteady box to step on]; *Brodie v. Carolina Midland R. Co.*, 46 S. C. 203; 24 S. E. 180 [no stool to step on]; *Texas, etc. R. Co. v. Miller*, 79 Tex. 78; 15 S. W. 264 [defective platform]; *Alexandria, etc. R. Co. v. Herndon*, 87 Va. 193; 12 S. E. 289 [no platform; dark night; snow-storm; female passenger]) or getting on train (*Eichhorn v. Missouri*,

But when access is easy, without such aid, as where a guarded plankway is laid from a ship to the pier,² or the platform of a railway car is attainable by steps of ordinary length, and otherwise convenient, assistance cannot be required as of right.³ Under circumstances which would lead reasonable and humane persons to render such assistance, a jury may find that a sick or infirm passenger should be assisted to alight;⁴ and if the

etc. R. Co., 130 Mo. 575; 32 S. W. 993).

² In *Hrebik v. Carr* (29 Fed. 298), a passenger on the steamship, while returning to the wharf from the steamer prior to her departure, fell from the gangplank and was drowned. The gangway was a single narrow plank, without battens or ropes. Held, that the owners of the steamship were negligent in not maintaining a safer gangplank. See *Simonin v. N. Y., Lake Erie, etc. R. Co.*, 36 Hun, 214.

³ It is not, in general, the duty of a railroad company to furnish a person to aid a passenger in alighting from the car (*Lafflin v. Buffalo, etc. R. Co.*, 106 N. Y. 136; 12 N. E. 599; *Raben v. Central Iowa R. Co.*, 73 Iowa, 579; 34 N. W. 621; 35 N. W. 645). Where access to a train at a station is easy, it is not the duty of the carrier's employees to assist a passenger in getting on board (*Yarnell v. Kansas City, etc. R. Co.*, 113 Mo. 570; 21 S. W. 1).

⁴ In former editions, a different rule was stated, solely upon the authority of *New Orleans, etc. R. Co. v. Stattham*, 42 Miss. 607. And it has since been held that an infirm passenger could not recover for injuries received in alighting, on the ground that the company failed to help him alight, though at the time he was helped on the train, the porter was notified to assist him in alighting (*Daniels v. Western, etc. R. Co.*, 96 Ga. 786; 22 S. E. 956). But we al-

ways thought the doctrine harsh, and we fully approve the following decisions, which declare the rule now stated in the text: *Croom v. Chicago, etc. R. Co.*, 52 Minn. 296; 53 N. W. 1128 [plaintiff eighty years old, weak in body and mind, and accepted as a passenger without an attendant, and with knowledge of his condition]; *Madden v. Port Royal, etc. R. Co.*, 35 S. C. 381; 14 S. E. 713 [duty to provide stepping stool for infirm passenger]; *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25; 10 S. W. 741; *St. Louis, etc. R. Co. v. Finley*, 79 Tex. 85; 15 S. W. 266. A person who is blind, aged, sick, or infirm, if his condition is known to the carrier, is entitled to more care and attention than one who is under no such disability, as to the time allowed and assistance rendered in getting on and off the carrier's conveyance (*Hanks v. Chicago, etc. R. Co.*, 1 Mo. App. 92; see also *Fisher v. West Va., etc. R. Co.*, 39 W. Va. 366; 19 S. E. 578; *Weightman v. Louisville, etc. R. Co.*, 70 Miss. 563; 12 So. 586 [sick passenger carried beyond his station, and put off alone]). But it is for the jury, not the court, to decide; and it is error to charge that it is the especial duty of the conductor to assist from train any passengers who are "aged, helpless, and infirm" (*Simms v. So. Carolina R. Co.*, 27 S. C. 268; 3 S. E. 301). It is not negligence not to render the physically infirm all the assistance they may require; for ex-

carrier is accustomed to provide assistance for such purposes, an infirm person has a right to expect that he will be in like manner assisted; and, having set out upon his journey in reliance upon the carrier's custom, he is entitled to its continuance in his favor. How far a passenger may be justified in taking the risk of entering without assistance or convenient accommodation, where none is provided, is a question to be considered when treating of contributory fault. Whether bound to assist a passenger or not, a carrier is always liable for negligence in so doing.⁵ As to passengers who are intending to take a train, the carrier is required to give only the usual signals; he is not bound to take extraordinary precautions to prevent their being left.⁶ So it is not in general the duty of a conductor to give individual warning to passengers of their arrival at their destination; and it has been held that his neglect to keep a promise to do so does not make the company liable.⁷ But we cannot

ample, a conductor is not bound to search the pockets of a paralytic for his ticket (*Louisville, etc. R. Co. v. Fleming*, 14 Lea, 128). The jury may take into consideration the failure of the conductor to assist a lady passenger to alight, in connection with other circumstances, in determining whether the railway company was negligent in furnishing proper means for her to alight (*Brodie v. Carolina Midland R. Co.*, 46 S. C. 203; 24 S. E. 180).

⁵ *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49. See *Allender v. Chicago, etc. R. Co.*, 43 Iowa, 276; *Mackin v. People's R., etc. Co.*, 45 Mo. App. 82 [passenger, in alighting from horse-car, took hold of the door jamb, when she was roughly seized by the conductor in assisting her, and, the rings on her fingers being caught on the tongue of the lock plate, her hand was torn and broken; company liable]. Plaintiff having discovered he was on the wrong train, after it was started, asked the conductor to stop the train and put him off, telling him that he could not see well;

the conductor put him off without stopping. Held, company was liable. While the company would not be bound to stop to allow him to get off, except at a regular station, yet if it did stop for that purpose, it should have made use of such care as the passenger's condition required to prevent injury to him (*Columbus, etc. R. Co. v. Powell*, 40 Ind. 37). The conductor directed a female passenger to get off and go to the rear, where there was no platform, and it was difficult to get on. When about to get aboard, a brakeman seized her by the arm and jerked her up the steps with unnecessary force. Held, a verdict for plaintiff was justified (*International, etc. R. Co. v. Mulliken*, 10 Tex. Civ. App. 663; 32 S. W. 152).

⁶ *Central R., etc. Co. v. Perry*, 58 Ga. 461. s. p., *Paulitsch v. N. Y. Central, etc. R. Co.*, 102 N. Y. 280; 6 N. E. 577.

⁷ *Nunn v. Georgia R. Co.*, 71 Ga. 710; *Sevier v. Vicksburg, etc. R. Co.*, 61 Miss. 8. But the latter case was much limited in *Weightman v.*

approve of such a decision. Passengers have a right to rely upon the negative representation conveyed by silence, under such circumstances, as much as upon a positive assurance that the station has not been reached.

§ 511. Duty to maintain guard against egress. — When a carrier is accustomed to keep up guards or chains until it is safe for passengers to enter or leave the vehicle, they have a right to assume, when the guard is let down, that it is safe for them to proceed; and if, by the carelessness of the carrier or his agents, the guard is let down too soon, and a passenger, relying upon its absence, proceeds, the carrier is responsible for an injury ensuing therefrom¹ if it could have been reasonably anticipated, but not otherwise.²

§ 512. Duty to preserve order. — A common carrier must use at least ordinary care, and probably the utmost care,¹ to preserve order, and to prevent the commission of violence, insult

Louisville, etc. R. Co., 70 Miss. 563; 12 So. 586 (cited in note 4, *supra*), and in *Carson v. Leathers* (57 Miss. 650), it was held that where it was the custom of a carrier by steamboat to notify passengers of their arrival at places of destination, he might be liable for a neglect to do so. Where, on a train approaching a station, an announcement of the station, with a direction to change, was made by some one without authority, and the train stopped before reaching the station, it is a question for the jury whether the company was negligent in failing to warn passengers not to leave the train upon that stop (*Floytrup v. Boston, etc. R.*, 163 Mass. 152; 39 N. E. 797). An instruction that a railroad is bound to exercise the strictest vigilance in carrying passengers to their destination, and in setting them down thereat, is erroneous, the conductor's duty in that respect being merely to announce the station and give the passenger a reasonable op-

portunity to leave the cars (*Hurt v. St. Louis, etc. R. Co.*, 94 Mo. 255; 7 S. W. 1).

¹ *Ferris v. Union Ferry Co.*, 36 N. Y. 312; and see *Hazman v. Hoboken Land, etc. Co.*, 2 Daly, 130; 50 N. Y. 53.

² *Cleveland v. N. J. Steamb. Co.*, 125 N. Y. 299; 26 N. E. 327 [passenger pushed off by crowd; carrier not liable]; see *Tonkins v. N. Y. Ferry Co.*, 47 Hun, 562; *Loftus v. Union Ferry Co.*, 84 N. Y. 455.

¹ In *Illinois Cent. R. Co. v. Minor* (69 Miss. 710; 11 So. 101), it was held that no more than ordinary care is required for this purpose. In *Flint v. Norwich, etc. Tr. Co.* (34 Conn. 554), and *Chicago, etc. R. Co. v. Pillsbury*, (123 Ill. 9; 14 N. E. 22), it was said that "the utmost vigilance and care" must be used. *S. P. Meyer v. St. Louis, etc. R. Co.*, 10 U. S. App. 677; 4 C. C. A. 221; 54 Fed. 116; *Missouri, etc. R. Co. v. Russell*. 8 Tex. Civ. App. 578; 28 S. W. 1042.

or nuisances on his vehicle by any persons whatsoever.² If he has any reason to apprehend that he will be unable to do so, he ought to give timely notice to orderly passengers; and, in default of such care or notice, he will be liable for any injury suffered by them from such violence or negligence of other passengers as he ought to have foreseen.³ But he is not responsible for either violent acts or their consequences, if they could not reasonably have been anticipated,⁴ as within

² *Flint v. Norwich, etc. Tr. Co.*, 34 Conn. 554; *Pendleton v. Kinsley*, 3 Cliff. 416. A railroad carrier is responsible for injuries inflicted by a passenger upon another passenger, in the course of violent efforts to get out of the car in haste, while loaded with bundles, the time allowed for transfer being insufficient (*Baldwin v. Fairhaven, etc. R. Co.*, 68 Conn. 567; 37 Atl. 418). *s. p.*, *Evansville, etc. R. Co. v. Darting*, 6 Ind. App. 375; 33 N. E. 686 [several passengers, without cause, encouraged by brakeman, assaulted plaintiff; conductor, seeing the impending assault, made no effort to prevent it]; *Lucy v. Chicago, etc. R. Co.*, 64 Minn. 7; 65 N. W. 944 [conductor failed, after notice to protect passenger from vile and abusive language of drunken man]; *Louisville, etc. R. Co. v. McEwan*,

Ky. 11; 31 S. W. 465 [duty to eject passenger injuring another]. The carrier's duty to exercise physical restraint over, or eject, an insane person, extends to cases where the conduct of the insane person indicates that there is a reasonable possibility that he will do violence to those about him, as well as a probability (*Meyer v. St. Louis, etc. R. Co.*, 10 U. S. App. 677; 4 C. C. A. 221; 54 Fed. 116).

³ *Pittsburgh, etc. R. Co. v. Hinds*, 53 Pa. St. 512; *Simmons v. New Bedford, etc. Steamb. Co.*, 97 Mass. 361. In a suit by a civilian passenger for damages for injuries in-

flicted on him by the discharge of a musket dropped on the deck of a steamer by one soldier struggling with another, the defendant is not excused by showing that he was compelled by the government to receive the soldiers on board, and that they were in charge of officers; clearly not, where he voluntarily received the plaintiff on board without notice to him of the enforced presence of the soldiers (*Flint v. Norwich, etc. Tr. Co.*, 34 Conn. 554). A passenger in a railroad train was assaulted by another passenger. He appealed to the conductor for protection, but instead of protecting him the conductor went away and left him he was again assaulted and injured. Held, the company was liable (*Flannery v. Baltimore, etc. R. Co.*, 4 Mackey [D. C.], 111). *s. p.*, *Britton v. Atlanta, etc. R. Co.*, 88 N. C. 536; *New Orleans, etc. R. Co. v. Burke*, 53 Miss. 200. See also *King v. Ohio, etc. R. Co.*, 22 Fed. 413; *Illinois Cent. R. Co. v. Minor*, 69 Miss. 710; 11 So. 101 [company liable for unprovoked insult and injuries to passenger by his fellow-passengers, provided conductor had notice that such insult and injury were threatened, and, with assistance of employees and willing passengers, could have prevented same].

⁴ *Cleveland v. N. J. Steamb. Co.*, 125 N. Y. 299; 26 N. E. 327; *Meyer v. St. Louis, etc. R. Co.*, 10 U. S. App. 677; 4 C. C. A. 22; 54 Fed. 116.

the range of possibility;⁵ nor for such acts as he could not, with due care and diligence, prevent.⁶ A passenger, evidently insane, must be put under restraint.⁷ One so intoxicated as to be violent or otherwise dangerous must be controlled or put off,⁸ and the carrier is especially liable if an intoxicated person

Plaintiff's intestate, with two ladies, took passage on defendant's car; a stranger, who was intoxicated, got on the car and insulted and annoyed the ladies, but was quiet and sat down when told to do so by the conductor. He, however, sat down near deceased, and abused and threatened him in a low tone, not audible to the conductor; after a short time he went to the front platform, where he remained quiet until deceased left the car, when he jumped off and struck him with the car hook, causing death. Held, that there was no evidence of neglect of duty on the part of the conductor, to which the attack upon deceased could be legally or logically traced, and that the carrier was not liable (*Putnam v. Broadway, etc. R. Co.*, 55 N. Y. 108). *S. P.*, *Batton v. South, etc. Ala. R. Co.*, 77 Ala. 591. The mere fact that, when one passenger was assaulted by another, the conductor was present, does not render the company liable (*Springfield R. Co. v. Flynn*, 55 Ill. App. 600). See *Pounder v. North Eastern R.* [1892], 1 Q. B. 385. Robbery committed from the person of a passenger traveling in an overcrowded railway carriage is not, of itself, such a natural and probable consequence of the overcrowding as to make the company liable to the passenger, even if the overcrowding was caused by the negligence of the company's servants (*Cobb v. Great Western R. Co.*, 6 Reports, 203; *s. c.* [1894], App. Cas. 419).

⁵ To charge the company with the duty of restraint upon an insane per-

son it need not have been foreseen that without such restraint murder would follow (*Meyer v. St. Louis, etc. R. Co.*, 10 U. S. App. 677; 4 C. C. A. 221; 54 Fed. 116).

⁶ *Thomson v. Manhattan R. Co.*, 75 Hun, 548; 27 N. Y. Supp. 608. A railroad company is not liable to a passenger for injuries received from an unexpected assault by another passenger, when the conductor interferes and separates the parties as promptly as possible (*Mullan v. Wisconsin Cent. R. Co.*, 46 Minn. 474; 49 N. W. 249). One of two passengers, who were acquaintances and had been drinking together, cannot recover damages for abusive language used towards him by the other, who was intoxicated, or even for an assault, where the conductor used all reasonable efforts to protect him, quieted the offender once or twice, and, on his again becoming boisterous, gave him into custody at the next station (*Kinney v. Louisville, R. Co., Ky.*; 34 S. W. 1066).

⁷ Nor is it any excuse, in such a case, that such person, at the time of offering to become a passenger, was apparently harmless, and conducted himself in no way different from other passengers applying for passage (*Meyer v. St. Louis, etc. R. Co.*, 10 U. S. App. 677; 4 C. C. A. 221; 54 Fed. 116).

⁸ The failure of a conductor to afford to a passenger protection against drunken and violent men, to the extent of the power with which he is clothed by the company or by the law, when he has knowledge

is allowed to remain in a compartment reserved for persons of a different color or sex.⁹ And due care must be used to keep thieves out of cars.¹⁰ It is not the mere intoxication of a passenger, but the fact that he is thereby rendered dangerous or annoying to others, which gives the right and imposes the duty of his expulsion.¹¹ In general, a carrier can be held responsible only for such improprieties or offenses of passengers as are brought to his notice, while he has power to prevent or remedy them.¹² He is not responsible for the acts of passengers upon any principle of agency. Their acts are not to be imputed to him. Nor is he bound to furnish the means of resisting the unlawful violence of a mob.¹³ He is responsible, however, for his failure to use due care to keep a disorderly mob out of his vehicles or premises.¹⁴

that there is occasion for his interference, will subject the company to liability (*Richmond, etc. R. Co. v. Jefferson*, 89 Ga. 554; 16 S. E. 69). Where fighting was allowed to go on in a railroad car for a considerable time without interference by the conductor, who saw it, and a passenger not involved in it had his eye injured by some missile, judgment for plaintiff was affirmed; the court remarking that "the plaintiff lost his eye through the quarrel of a couple of drunken men, who should not have been permitted aboard the car, or, if so permitted, should have been so guarded or separated from the sober and orderly part of the passengers that no injury could have resulted from their brawls" (*Pittsburgh, etc. R. Co. v. Pillow*, 76 Pa. St. 510).

⁹ A railroad company whose conductor allows an intoxicated white passenger to enter or remain in a coach reserved for colored persons is liable in damages to a passenger to whom he uses obscene or indecent language, or whom he otherwise maltreats (*Quinn v. Louisville, etc. R. Co.*, 98 Ky. 231; 32 S. W. 742).

¹⁰ *Connell v. Chesapeake, etc. R. Co.*, 93 Va. 44; 24 S. E. 467; *Wright v. Chicago, etc. R. Co.*, 4 Colo. App. 102; 35 Pac. 196 [passenger robbed on entering train, and not protected, though shouting for help].

¹¹ The person who caused the injury was somewhat intoxicated, but there was no evidence of any conduct on his part that would have justified his expulsion from the car. Held, that defendant was not liable (*Thomson v. Manhattan R. Co.*, 75 Hun, 548; 27 N. Y. Supp. 608; *Illinois Cent. R. Co. v. Sheehan*, 29 Ill. App. 90). But a conductor is justified in ejecting an intoxicated person who used indecent language (*O'Laughlin v. Boston & Maine R. Co.*, 164 Mass. 139; 41 N. E. 121), if he uses such language in a tone sufficiently loud to annoy other passengers (*Chicago R. Co. v. Pelletier*, 134 Ill. 120; 24 N. E. 770).

¹² See cases cited in note 4, *supra*.

¹³ *Pittsburgh, etc. R. Co. v. Hinds*, 53 Pa. St. 512.

¹⁴ *Chicago, etc. R. Co. v. Pillsbury*, 123 Ill. 9; 14 N. E. 22 [passenger shot by mob].

§ 513. **Liability for servant's malicious acts.**—The rule relieving a master from liability for a malicious and unauthorized injury inflicted by his servant, when not acting within the scope of his employment,¹ does not fully apply as between a passenger and his carrier; the carrier being bound to protect his passenger from any injury arising from the willful misconduct, as well as from the negligence of his servants, while engaged in performing a duty which the carrier owes to the passenger.² A carrier, being bound to protect passengers, to the extent of his power, from the insults and violence of strangers,³ is much more bound to see that his own servants do not commit such injuries. And he is responsible in damages for assaults made upon passengers,⁴ and insults or abuse

¹ This is the rule as to trespassers, including those who attempt to travel upon trains, with intent not to pay fare, even when demanded. In such a case, the company is liable for the act of the conductor, in putting off the trespasser, "although he may have done it in a careless or reckless manner; but for his unauthorized, willful and wanton or malicious trespass, the company is not liable" (*Pennsylvania Co. v. Toomey*, 91 Pa. St. 256). *s. p.*, *Pittsburgh, etc. R. Co. v. Donahue*, 70 Pa. St. 119; *Eads v. Metropolitan R. Co.*, 43 Mo. App. 536. See *Alabama, etc. R. Co. v. Frazier*, 93 Ala. 45; 9 So. 303.

² *Louisville, etc. R. Co. v. Wood*, 113 Ind. 544; 14 N. E. 572; 16 Id. 197. It was long ago held to be no defense to an action against a railroad company for its failure to transport a passenger with proper dispatch, that the detention was the willful act of a conductor in charge of the train (*Weed v. Panama R. Co.*, 17 N. Y. 362). Afterwards, in *Isaacs v. Third Av. R. Co.* (47 N. Y. 122) it was held that a carrier was not liable for the willful assault of a conductor on a passenger. But that decision has been completely overruled in the same court, *Tracy, J., saying*,

in an excellent opinion, that it "was discussed by counsel and determined by this court upon the assumption that the rule of the master's liability for the assault of a servant committed upon a person to whom the master owed no duty was applicable to that case. The mind of the court was not called to the fact that the rule applicable to such a case does not apply to the case of an assault committed upon a passenger by a servant intrusted with the execution of a contract of a common carrier" (*Stewart v. Brooklyn, etc. R. Co.*, 90 N. Y. 588, 594). The opinion of Judge Tracy has been often quoted, and is universally followed, as will appear by the many cases cited below. The conduct of defendant's servants, engaged in a playful scuffle on a station platform, in unintentionally pushing against plaintiff, who was preparing to go upon the train, held, not fairly incident to their employment, and defendant was not liable (*Goodloe v. Memphis etc. R. Co.*, 107 Ala. 233; 18 So. 166).

³ See last section.

⁴ *Dwinelle v. N. Y. Central R. Co.*, 120 N. Y. 117; 24 N. E. 319; *rev'g* 45 Hun, 139 [sleeping-car porter]; *Stewart v. Brooklyn, etc. R. Co.*, 90

addressed to them,⁵ by his servants, or persons allowed to act as such,⁶ at any time during the journey,⁷ or within the period during which (as already stated)⁸ the carrier is under obligation to use care, in any degree, to one who contemplates becoming a passenger,⁹ or, having completed his journey, has not entirely quitted the carrier's premises.¹⁰ Furthermore, in our opinion, a carrier must answer for injuries inflicted by his servant, entirely outside of the carrier's premises, provided the

N. Y. 588 [car driver]; *Winnegar v. Central, etc. R. Co.*, 85 Ky. 547; 4 S. W. 237 [same]; *Schultz v. Third Av. R. Co.*, 89 N. Y. 242 [conductor]; *Hoffman v. N. Y. Central R. Co.*, 87 N. Y. 25 [conductor kicked boy off car]; *Baltimore, etc. R. Co. v. Barger*, 80 Md. 23; 30 Atl. 560 [conductor]; *Texas, etc. R. Co. v. Williams*, 10 C. C. A. 463; 62 Fed. 440 [same]; *Bryant v. Rich*, 106 Mass. 180 [steamer steward]; *Sherley v. Billings*, 8 Bush, 147 [third clerk of boat]; *White v. Norfolk, etc. R. Co.*, 115 N. C. 631; 20 S. E. 191 [sailor]; *Houston, etc. R. Co. v. Washington, Tex. Civ. App.*; 30 S. W. 719; *International, etc. R. Co. v. Cooper, Tex. Civ. App.*; 30 S. W. 470 ["practical joke;" hot water]; *Texas, etc. R. Co. v. Edmond, Tex. Civ. App.*; 29 S. W. 518 [drunken passenger kicked by train porter]; *Savannah, etc. R. Co. v. Bryan*, 86 Ga. 322; 12 S. E. 307 [assault by conductor on train, renewed at office, where plaintiff went to complain; carrier liable for all]; *East Tenn. etc. R. Co. v. Fleetwood*, 90 Ga. 23; 15 S. E. 778. The following were cases of assault by brakemen: *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Chicago, etc. R. Co. v. Flexman*, 103 Ill. 546; *Texas, etc. R. Co. v. Johnson*, 2 Tex. Civ. Cas. § 190; *Lampkin v. Louisville, etc. R. Co.*, 106 Ala. 287; 17 So. 448; *Atchison, etc. R. Co. v. Henry*, 55 Kans. 715; 41 Pac. 952.

⁵ Insults, although merely verbal, are a good ground for such an action (*Laffitte v. New Orleans, etc. R. Co.*, 43 La. Ann. 34; 8 So. 701; *Fordyce v. Nix*, 58 Ark. 136; 23 S. W. 967; *Pittsburgh, etc. R. Co. v. Ensign*, 10 Ohio C. C. 21 [punitive damages]). A female passenger may recover from the carrier, not only for an actual indecent assault by a servant (*Campbell v. Pullman Car Co.*, 42 Fed. 484 [sleeping-car porter]), but also for indecent approaches (*Cracker v. Chicago, etc. R. Co.*, 36 Wisc. 657; *Louisville, etc. R. Co. v. Ballard*, 85 Ky. 307; 3 S. W. 530). See *Sira v. Wabash R. Co.*, 115 Mo. 127; 21 S. W. 905 [alleged conspiracy against female passenger].

⁶ Evidence that a passenger was assaulted by one who was acting as a brakeman is sufficient (*Conger v. St. Paul, etc. R. Co.*, 45 Minn. 207; 47 N. W. 788). Company liable for an assault by a policeman employed by it (*Texas, etc. R. Co. v. Bowlin, Tex. Civ. App.*; 32 S. W. 918).

⁷ Most of the cases cited were of this description.

⁸ See §§ 488-490, *ante*.

⁹ *Illinois Cent. R. Co. v. Sheehan*, 29 Ill. App. 90 [person waiting for train, having no ticket].

¹⁰ *Krantz v. Rio Grande R. Co.*, 12 Utah, 104; 41 Pac. 717. But compare *McGilvray v. West End R. Co.*, 164 Mass. 122; 41 N. E. 116.

servant immediately follows the passenger, for the purpose of injury or quarrel, under the influence of a motive formed within the premises.¹¹ The carrier does not, however, remain liable, for an indefinite time, for the renewal by his servants of a quarrel, when entirely out of service.¹² It is no defense that the class of men usually employed on similar vehicles are quarrelsome and violent.¹³

§ 513a. Passengers on freight trains. — On many trains, there is no accommodation for passengers; and the rules of railroad companies do not permit passengers to travel upon them; while on others, only a small and special class of travelers is permitted. As nearly all of such trains are freight trains, it is convenient to speak of all under that title. A freight train, on which ordinary passengers are regularly invited to ride, is called a mixed train. One who, with notice that the rules prohibit him from doing so,¹ enters upon a freight train, is not a passenger,² but is either a trespasser or a mere licensee, according to circumstances.³ Permission to ride on such a train, given by an agent, without authority, express or implied, will not avail a traveler having such notice.⁴ But

¹¹ See *Wise v. So. Covington, etc. R. Co.* [Ky.], 34 S. W. 894.

¹² *Krantz v. Rio Grande R. Co.*, *supra*.

¹³ *Memphis, etc. Packet Co. v. Pikey*, 142 Ind 304; 40 N. E. 527.

¹ *Louisville, etc. R. Co. v. Hailey*, 94 Tenn. 383; 29 S. W. 367. Such notice, in some form, is necessary to deprive a traveler of the rights of a passenger (*McGee v. Missouri Pac. R. Co.*, 92 Mo. 208; 4 S. W. 739; *Boggess v. Chesapeake, etc. R. Co.*, 37 W. Va. 297; 16 S. E. 525; *Boehm v. Duluth, etc. R. Co.*, 91 Wisc. 592; 65 N. W. 506).

² *Powers v. Boston, etc. R. Co.*, 153 Mass. 188; 26 N. E. 446; *Janny v. Great Northern R. Co.*, 63 Minn. 380; 65 N. W. 450.

³ *Illinois Cent. R. Co. v. Meacham*, 91 Tenn. 428; 19 S. W. 232 [trespasser].

⁴ It is not within the apparent scope of the employment of a conductor on a train used exclusively for transporting freight to invite persons to ride on his train; and one who accepts such an invitation, with no intention to pay fare, has not the rights of a passenger; and the railroad company is not liable to him for an injury sustained by him in a collision while so riding on the train (*Powers v. Boston, etc. R. Co.*, 153 Mass. 188; 26 N. E. 446; *Gulf, etc. R. Co. v. Campbell*, 76 Tex. 174; 13 S. W. 19). To the contrary, *Whitehead v. St. Louis, etc. R. Co.*, 99 Mo. 263; 11 S. W. 751; *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512; 10 S. W. 486. To give effect to such invitations by conductors, there must be evidence of a custom to give them, of such a nature that the railroad managers were chargeable

special circumstances, such as, for example, would make it inhuman to refuse such permission, would justify a traveler in believing that his admission was not wrongful; and permission thus given by any servant of the company would relieve him from charge of trespass. In general, the fact that a train was obviously used only for freight, would be sufficient evidence of notice of a rule prohibiting its use by passengers;⁵ but it is not conclusive,⁶ and would be fully rebutted by proof that such trains on that road or in that section of the country were accustomed to accept passengers.⁷ One who is invited by the actual or apparent authority of the company to ride upon a freight train is a passenger,⁸ and not a mere licensee; and more emphatically is this true of passengers paying fare, whether traveling on mixed⁹ or on strictly freight¹⁰ trains. Such passengers have all the rights of any other passengers,¹¹ except (if

with notice and waived their rules (*Powers v. Boston, etc. R. Co.*, 153 Mass. 188; 26 N. E. 446; *San Antonio, etc. R. Co. v. Lynch*, 8 Tex. Civ. App. 513; 28 S. W. 252). Where a person, after being told by the conductor of a freight train that he is forbidden by a rule of the company to carry passengers, induces the conductor to permit him to ride on the train, he becomes a trespasser, though he pays the regular fare (*Louisville, etc. R. Co. v. Hailey*, 94 Tenn. 383; 29 S. W. 367). A brakeman on a freight train, having no authority to collect fares, a trespasser, by paying money to him, does not become a passenger (*McNamara v. Great Northern R. Co.*, 61 Minn. 296; 63 N. W. 726; *Janny v. Great Northern R. Co.*, 63 Minn. 380; 65 N. W. 450; *Candiff v. Louisville, etc. R. Co.*, 42 La. Ann. 477; 7 So. 601).

⁵This is clearly implied in nearly all the cases cited under this section.

⁶*Bogges v. Chesapeake, etc. R. Co.*, 37 W. Va. 297; 16 S. E. 525. And even an express contract prohibiting a passenger to ride in such a car may be waived (*Chicago, etc.*

R. Co. v. Dickson, 143 Ill. 368; 32 N. E. 380).

⁷See *Edgerton v. Harlem R. Co.*, 39 N. Y. 227; *Boehm v. Duluth, etc. R. Co.*, 91 Wis. 592; 65 N. W. 506; *Illinois Cent. R. Co. v. Axley*, 47 Ill. App. 307.

⁸*Lake Shore, etc. R. Co. v. Brown*, 123 Ill. 162; 14 N. E. 197.

⁹*Hartzig v. Lehigh Val. R. Co.*, 154 Pa. St. 364; 26 Atl. 310 [obedience to imprudent directions].

¹⁰*Edgerton v. Harlem R. Co.*, 39 N. Y. 227. Plaintiff, having tried to purchase a ticket to ride on defendant's freight train, and being directed by the agent to pay on the train, climbed on one of the freight cars, the platform of the caboose being crowded. Held, that the question whether plaintiff was a passenger should have been submitted to the jury (*Ramm v. Minneapolis, etc. R. Co.*, 94 Iowa, 296; 62 N. W. 751).

¹¹*Pennsylvania Co. v. Newmeyer*, 129 Ind. 401; 28 N. E. 860; *Edgerton v. Harlem R. Co.*, 39 N. Y. 227; *Delaware, etc. R. Co. v. Ashley*, 14 C. C. A. 368; 67 Fed. 209. See § 523, *post*.

it can be called an exception) that they are not entitled to such assistance, convenience and safeguards as are not reasonably to be expected on such trains,¹² and that the train may be lawfully managed with more regard to the convenient transportation of freight than to the convenience of passengers.¹³ Thus the frequency of jolts in making up trains,¹⁴ the absence of means of signaling the engineer by a bell rope or otherwise,¹⁵ of buffers between the cars,¹⁶ of a platform convenient for alighting,¹⁷ of a station suitable for passengers at a stopping place¹⁸ or of lights in the station or in the cars,¹⁹ will not necessarily amount even to evidence of negligence in the management of a freight or mixed train. And a passenger who accepts a position obviously exposed to peculiar dangers (for example, the outside or top of a car) assumes the risks which obviously attach thereto.²⁰ But, with these qualifications, the rule requiring the highest degree of care applies to passengers on mixed or freight trains, as much as to any other;²¹ and, so

¹² *Reber v. Bond*, 38 Fed. 822. See *Crine v. East Tenn., etc. R. Co.*, 84 Ga. 651; 11 S. E. 555.

¹³ See *Browne v. Raleigh, etc. R. Co.*, 108 N. C. 34; 12 S. E. 958, and cases in following notes.

¹⁴ One who takes passage on a freight train and is injured by a jolt caused by coupling cars, cannot recover, where the jolt was not caused by negligence, but was usual and necessary in coupling the cars (*Crine v. East Tennessee, etc. R. Co.*, 84 Ga. 651; 11 S. E. 555; and see *Wallace v. Western N. C. R. Co.*, 98 N. C. 494; 4 S. E. 503). But this does not excuse needless jolts or starts without due warning (*Wallace v. Western N. C. R. Co.*, 101 N. C. 454; 8 S. E. 166). The brakeman called out the name of the station, and then the train stopped, and plaintiff rose to leave. The train started again, with a jerk, before she could leave the car, and she was thrown down. Held, that defendant was negligent (*Chicago, etc. R. Co.*

v. Arnol, 144 Ill. 261; 33 N. E. 204.) s. p., *Olson v. St. Paul, etc. R. Co.*, 45 Minn. 536; 48 N. W. 445.

¹⁵ *Oviatt v. Dakota Cent. R. Co.*, 43 Minn. 300; 45 N. W. 436.

¹⁶ This is clearly implied in all the "jolting cases."

¹⁷ Mixed trains need not stop at regular passenger platforms (*Browne v. Raleigh, etc. R. Co.*, 108 N. C. 34; 12 S. E. 958).

¹⁸ *Cleveland, etc. R. Co. v. Maxwell*, 59 Ill. App. 673.

¹⁹ *Dowd v. Chicago, etc. R. Co.*, 84 Wisc. 105; 54 N. W. 24 [train at unusual hour of night].

²⁰ *Atchison, etc. R. Co. v. Lindley*, 42 Kans. 714; 22 Pac. 703 [top of freight-car]; *St. Louis So. R. Co. v. Rice*, 9 Tex. Civ. App. 509; 29 S. W. 525 [top of caboose]; *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512; 10 S. W. 486.

²¹ *Chicago, etc. R. Co. v. Arnol*, 144 Ill. 261; 33 N. E. 204; *Missouri Pac. R. Co. v. Holcomb*, 44 Kans. 332; 24 Pac. 467. A person who is

far as the condition of the track or the general management of the traffic is concerned, there is no difference whatever.²² Passengers on such trains are bound, on their part, to use such care and caution as the apparent dangers of such travel reasonably call for. It is not enough for them to use merely the same kind of care which is sufficient on a regular passenger train.²³

§ 514. Obligations of coach proprietors.—A coach owner, engaged in the transportation of passengers, being bound, like other carriers, to use the utmost care,¹ must have drivers of competent skill, using at least ordinary diligence and the utmost caution and prudence, who are well acquainted with the road they travel;² and he must also furnish well-broken, safe, and steady horses, with harness and coach of sufficient strength, properly made and equipped;³ and the least failure in any one of these particulars subjects the coach-owner to the imputation of negligence, and makes him responsible for the

riding on a freight train in charge of stock in shipment, with the consent of the railroad company, whether on a regular ticket or on a drover's pass, is a passenger, and the carrier owes him the same duty as other passengers traveling on passenger trains, which requires it to use the highest reasonable and practicable skill and diligence to protect him from injury (*N. Y., Chicago, etc. R. Co. v. Blumenthal*, 160 Ill. 40; 43 N. E. 809).

²² *Ohio Val. R. Co. v. Watson*, 93 Ky. 654; 21 S. W. 244; *Whitehead v. St. Louis, etc. R. Co.*, 99 Mo. 263; 11 S. W. 751 [gross negligence].

²³ *Harris v. Hannibal, etc. R. Co.*, 89 Mo. 233; 1 S. W. 325; *Ft. Scott, etc. R. Co. v. Sparks*, 55 Kans. 288; 39 Pac. 1032 [passenger leaving caboose for freight car, against contract]; *Wallace v. Western N. C. R. Co.*, 98 N. C. 494; 4 S. E. 503 [standing, when he ought to have sat]; *Smith v. Richmond, etc. R. Co.*, 99 N. C. 241; 5 S. E. 896 [passenger

sitting on arm of a seat]. But where a company allowed a chair to remain in a caboose, it was held not contributory negligence for plaintiff to sit in it, instead of on the stationary seats (*Quackenbush v. Chicago, etc. R. Co.*, 73 Iowa, 458; 35 N. W. 523).

¹ *Gallagher v. Bowie*, 66 Tex. 265; 17 S. W. 407; and see notes below, and § 462, *ante*.

² It is no defense that the driver went out of the road at the repeated suggestion of the plaintiff, who told him he was too far to one side, and thus caused the upsetting of the vehicle over the bank, it being the duty of defendants to supply a driver who knew the road, and would not be controlled by suggestions from a passenger (*Anderson v. Scholey*, 114 Ind. 553; 17 N. E. 125).

³ *Anderson v. Scholey*, 114 Ind. 553; 17 N. E. 125 [failing to supply the coach with lights, whereby the driver missed the road in the darkness].

injury or damage arising from such failure.⁴ And even after making all this provision, he is still liable for the least carelessness of the driver,⁵ not only till the coach arrives at its destination, but till the passengers are safely set down.⁶ The starting of the horses, while a passenger is getting into or out of a coach, creates a presumption, either that the driver was careless, or the horses not safe and steady, which must be overcome by showing that the cause of such starting was beyond the control of the driver or proprietor.⁷ It is the duty of a driver to warn passengers when he is about to pass over a piece of road, bridge, etc., attended with danger, and requiring a change in their position or any unusual caution on their part.⁸ These rules apply to the owners of livery carriages, as much as to those of stage-coaches.⁹

⁴ *Stockton v. Frey*, 4 Gill, 406; *McKinney v. Neil*, 1 McLean, 540; *Peck v. Neil*, 3 Id. 22; *Frink v. Coe*, 4 Greene, 555; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Derwort v. Loomer*, 21 Conn. 245. If the coach is upset by the horses running off, not through an accidental fright, but because the blocks were out of the brake, causing the stage to run upon them; and if the running of the horses might have been prevented if the horses had been properly harnessed; or if the utmost care and diligence of a cautious person has not been used to secure the blocks in the brake, the proprietors are liable (*Farish v. Reigle*, 11 Gratt. 697). See *Hyman v. Nye*, L. R. 6 Q. B. D. 685 [bolt of carriage broke]; *Holton v. London, etc. R. Co.*, 1 Cab. & El. 542; *Kennon v. Gilmer*, 5 Mont. 257; 5 Pac. 847 [horses ran away]. A passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle. There was no evidence that the horse was a kicker, but it was proved that the panel bore marks of

other kicks, and that no precaution had been taken, by the use of a kicking-strap or otherwise, against the possible consequences of a horse striking out, and no explanation was offered on the part of defendant. Held, evidence sufficient to go to jury (*Simson v. London General Omnibus Co.*, L. R. 8 C. P. 390).

⁵ He is liable for the smallest degree of negligence or carelessness in a driver, or for his want of skill (*McKinney v. Neil*, 1 McLean, 540; *Peck v. Neil*, 3 Id. 22; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Frink v. Coe*, 4 Greene, 555; *Tuller v. Talbot*, 23 Ill. 357; *Perez v. New Orleans, etc. R. Co.*, 47 La. Ann. 1391; 17 So. 869 [attempting to cross a track in front of an approaching train]).

⁶ *Dudley v. Smith*, 1 Campb. 167.

⁷ *Roberts v. Johnson*, 58 N. Y. 613.

⁸ *Dudley v. Smith*, 1 Campb. 157; *McLean v. Burbank*, 11 Minn. 277. See *Maury v. Talmadge*, 2 McLean, 157.

⁹ *Benner Livery, etc. Co. v. Busson*, 58 Ill. App. 17.

§ 515. **Carriers by steam vessels.**—By act of Congress for the better security of passengers on steam vessels, details of their construction, equipment and management are prescribed, and provision is made for a compulsory inspection of their boilers and machinery by government inspectors.¹ The statute does not expressly prohibit a steam pressure in excess of the amount specified in the inspector's certificate, nor declare such higher pressure to be negligence, but it declares that any neglect or failure to comply with its provisions, resulting in injury to passengers, will give a right of action for the damage sustained by the passenger.² But the common-law liability of the owners of steam vessels is not in any manner restricted by the statute, and mere compliance with its provisions does not therefore relieve such owners from liability. The presumption of negligence arising from the bursting of a steamboat boiler is not created by the act of Congress, but arises from the common-law rule that when an event takes place which, according to the ordinary course of things, would not happen if proper care were exercised, it is presumed that such care was not exercised.³ The rule of mercantile law, making the master of a vessel liable for the negligence of his subordinates to the same extent as if he were owner, applies without regard to whether they were employed by him or by the owner.⁴ It cannot be laid down, as a rule of law, that a carrier by steamboat is negligent in not providing seats sufficient to accommodate all the passengers his boat will safely carry or all such as

¹ 10 U. S. Stat. at Large, 61; 16 Id. 440.

² *Carroll v. Staten Island R. Co.*, 58 N. Y. 126.

³ *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282. Thus, where a small boat attached to a steamboat fell and injured a passenger, it was held that the fact that it was hung where it was "by order of the government inspector did not protect the defendants from responsibility for negligence in the manner of hanging or using it" (*Simmons v. New Bedford, etc. St. Boat Co.*, 97 Mass. 361).

⁴ After a vessel has been in the temporary charge of a health officer for purposes of quarantine, it immediately devolves upon the master to see that it is restored to a proper condition for the safety and comfort of passengers; and he is personally liable for his neglect to do so (*Kennedy v. Ryall*, 67 N. Y. 379). This rule is applicable to the master of a steamboat for carrying passengers, as well as to vessels in the merchant service (*Dennison v. Seymour*, 9 Wend. 9; see *Watkinson v. Laugh-ton*, 8 Johns. 213; *Foot v. Wiswall*, 14 Id. 304).

ordinarily travel upon it; it is often the case that all of such passengers do not wish to be seated; and it is a question for the jury, considering the demand for seats, what insufficiency thereof will constitute negligence.⁵ If a carrier by steamboat makes no effort to save a passenger who falls overboard, he will be held liable, irrespective of the negligence of the passenger.⁶ The mere taking of steerage passengers from an infected port, on a steamship accustomed to carry steerage passengers, is no breach of the ship's duty to a cabin passenger.⁷

§ 516. Presumption of negligence. — The mere fact of an injury suffered by a passenger, while on his journey, without any evidence connecting the carrier with its cause, is not sufficient to raise a presumption of negligence on the part of the carrier,¹ But proof of injury suffered from contact with anything for which the carrier was responsible, or which, as a general rule,

⁵ *Burton v. West Jersey Ferry Co.*, 114 U. S. 474; 5 S. Ct. 960 [ferry-boat]. See § 510, *ante*.

⁶ *Melhado v. Poughkeepsie Trans. Co.*, 27 Hun, 99.

⁷ *The Normania*, 62 Fed. 469.

¹ *Holbrook v. Utica, etc. R. Co.*, 12 N. Y. 236; *Penna. R. Co. v. McKinney*, 124 Pa. St. 462; 17 Atl. 14 [reviewing the Pennsylvania decisions]; *Dennis v. Pittsburgh, etc. R. Co.*, 165 Pa. St. 624; 31 Atl. 52 [proof of crowding not enough]; *Donovan v. Hartford R. Co.*, 65 Conn. 201; 32 Atl. 350; *Yarnell v. Kansas City, etc. R. Co.*, 113 Mo. 570; 21 S. W. 1; *Olfermann v. Union Depot R. Co.*, 125 Mo. 408; 28 S. W. 742; *Bonce v. Dubuque R. Co.*, 53 Iowa, 278; *Birmingham R. Co. v. Hale*, 90 Ala. 8; 8 So. 142; *McDonald v. Montgomery R. Co.*, 110 Ala. 161; 20 So. 317; *Texas, etc. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272; 22 S. W. 994; *Hawkins v. Front-St. R. Co.*, 3 Wash. St. 592; 28 Pac. 1021. Various *dicta* to the contrary (see *Laing v. Colder*, 8 Pa. St. 479; *Galena, etc. R. Co. v.*

Yarwood, 17 Ill. 509; *Zemp v. Wilmington, etc. R. Co.*, 9 Rich. Law, 84; *Stokes v. Saltonstall*, 13 Peters, 181; *New Jersey R. Co. v. Pollard*, 22 Wall. 341; *Christie v. Griggs*, 2 Campb. 79) are overruled. The rule has been changed by statute, in Nebraska, where, in order to recover against a railroad company, it need only be proved that the person injured was at the time being transported as a passenger over defendant's line, and that the injury resulted from the operation of the railroad (*Missouri Pac. R. Co. v. Baier*, 37 Neb. 235; 55 N. W. 913; *St. Joseph, etc. R. Co. v. Hedge*, 44 Neb. 448; 62 N. W. 887). The Alabama statute (Code 1876, § 1700, as amended by act Feb. 28, 1887) puts the burden of proof on the company to show that the requirements of the preceding section (1699) were complied with, but otherwise leaves the general rule in force (*Georgia Pac. R. Co. v. Hughes*, 87 Ala. 610; 6 So. 413).

he ought to have guarded against, or from the absence of anything which, as a general rule, he ought to have supplied, is sufficient to put him upon his defense.² Having established so much, the plaintiff is entitled to recover, without proving affirmatively that the surrounding circumstances were of that character to which the general rule was meant to apply, and without showing "by what particular acts" of misconduct or negligence the injury was occasioned.³ Thus, for example, it is a general rule that a railroad company must maintain a good track and road-bed. Proof of a break in the track, by which the cars were thrown off, is therefore sufficient evidence of negligence to put the company upon its defense in an action by a passenger.⁴ So, in general, a railroad company is bound to keep its track clear; and therefore the presence of an animal or other obstruction upon the track, causing an injury to a passenger, is presumptive evidence of negligence.⁵ On the same principle, the mere fact of a train coming into collision with another train or part of the same train,⁶ or having run off

² Where the injury is caused by apparatus provided by the carrier, it is the duty of the court to charge that the injury itself, if plaintiff was exercising ordinary care, is *prima facie* evidence of negligence (Gleeson v. Va. Midland R. Co., 140 U. S. 435; 11 S. Ct. 859; N. Y., Chicago, etc. R. Co. v. Blumenthal, 160 Ill. 40; 43 N. E. 809; Dampman v. Pennsylvania R. Co., 166 Pa. St. 520; 31 Atl. 244; Baltimore, etc. R. Co. v. Swann, 81 Md. 400; 32 Atl. 175). But compare note 18, *infra*.

³ New Jersey R. Co. v. Pollard, 22 Wall. 341.

⁴ Southern Kans. R. Co. v. Walsh, 45 Kans. 653; 26 Pac. 45. Plaintiff is not bound to prove want of diligence in repairing, after a storm (Brehm v. Great Western R. Co., 34 Barb. 256). S. P., Philadelphia, etc. R. Co. v. Anderson, 94 Pa. St. 351; Chicago, etc. R. Co. v. Trotter, 60 Miss. 442. So also, where a cable car ran away, in consequence of the break-

ing of a grip-shank (Sharp v. Kansas City Cable R. Co., 114 Mo. 94; 20 S. W. 93).

⁵ Sullivan v. Phila., etc. R. Co., 30 Pa. St. 234; Willis v. Long Island R. Co., 34 N. Y. 670; Louisville, etc. R. Co. v. Hendricks, 128 Ind. 462; 28 N. E. 58 [cow on track]; Carrico v. West Virginia Cent., etc. R. Co., 35 W. Va. 389; 14 S. E. 12. But in an action for damages caused by stepping on an obstacle on the platform, in the absence of any evidence as to how the obstacle came there, and how long it had been there, the court properly granted a nonsuit (Bernhardt v. Western Pa. R. Co., 159 Pa. St. 360; 28 Atl. 140).

⁶ So held, in cases of collision between separate trains (Iron R. Co. v. Mowery, 36 Ohio St. 418; Clark v. Chicago, etc. R. Co., 127 Mo. 197; 29 S. W. 1013; West Chicago R. Co. v. Martin, 47 Ill. App. 610; Hamilton v. Great Falls R. Co. 17 Mont. 334; 42 Pac. 860; 43 Id. 713; Smith

the track,⁷ or being several hours behind time,⁸ or the breaking of an axle or wheel, or the fall of a bridge,⁹ is *prima facie* evidence of negligence. So the overturn of a car or stage-coach,¹⁰

v. N. Y. Susquehanna, etc. R. Co., 46 N. J. L. 7; and so as to collisions between cars of the same train while separated (New Jersey R. Co. v. Polard, 22 Wall. 341; Georgia Pac. R. Co. v. Love, 91 Ala. 432; 8 So. 714; limited in *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244; 25 Atl. 104 [necessary violence in coupling]). So held, in cases of collision between street cars (*Schneider v. Second Ave. R. Co.*, 133 N. Y. 583; 30 N. E. 752; *North Chicago R. Co. v. Cotton*, 140 Ill. 486; 29 N. E. 899), or a street car and a train (*Little Rock, etc. R. Co. v. Harrell*, 58 Ark. 454; 25 S. W. 117 [action for death of deceased caused by collision between street-car on which he was a passenger and a railroad train]).

⁷ *Seybolt v. N. Y., Lake Erie, etc. R. Co.*, 95 N. Y. 563; *Edgerton v. Harlem R. Co.*, 39 Id. 227; aff'g 35 Barb. 193; *Feital v. Middlesex R. Co.*, 109 Mass. 398; *Yonge v. Kinney*, 28 Ga. 111; *Louisville, etc. R. Co. v. Jones*, 108 Ind. 551; 9 N. E. 476; *Pittsburgh, etc. R. Co. v. Williams*, 74 Ind. 462; *Ohio, etc. R. Co. v. Voight*, 122 Ind. 288; 23 N. E. 774; *Texas, etc. R. Co. v. Suggs*, 62 Tex. 323; *Mexican Cent. R. Co. v. Lauricella*, 87 Id. 277; 28 S. W. 277; *Montgomery, etc. R. Co. v. Mallette*, 92 Ala. 209; 9 So. 363; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438; 13 S. W. 1044; *Webster v. Elmira, etc. R. Co.*, 85 Hun. 167; 32 N. Y. Supp. 590. s. p., *Thatcher v. Great Western R. Co.*, 4 Upp. Can. [C. P.], 543; *Peoria, etc. R. Co. v. Reynolds*, 88 Ill. 418; *Mitchell v. Chicago, etc. R. Co.*, 51 Mich. 236; 16 N. W. 388; *Louisville, etc. C. R. Co. v. Pedigo*, 108 Ind. 481; *Cleveland, etc. R. Co.*

Newell, 104 Ind. 264; 3 N. E. 836; *Moore v. Des Moines, etc. R. Co.*, 69 Iowa, 491; 30 N. W. 51; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278. This rule has been applied to street-railways (*Baltimore, etc. Turnp. Co. v. Leonhardt*, 66 Md. 70; *Spellman v. Lincoln Transit Co.*, 36 Neb. 890; 55 N. W. 270). Plaintiff, while standing up between the seats of an open horse-car, there being no unoccupied seats therein, was thrown down, in consequence of the rapid driving of the car around a curve. Held, sufficient (*Lapointe v. Middlesex R. Co.*, 144 Mass. 18). Where a train ran off the track, evidence that at the time the accident occurred the train was running down a steep incline on a new and curved track, at an unusual and dangerous rate of speed, is sufficient (*Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62; 25 Pac. 245).

⁸ *Chicago, etc. R. Co. v. George*, 19 Ill. 510.

⁹ *Bedford, etc. R. Co. v. Rainbolt*, 99 Ind. 561 [bridge]; *Baltimore, etc. R. Co. v. Wightman*, 29 Gratt. 431; *Baltimore, etc. R. Co. v. Noell*, 32 Id. 394. Compare *Dale v. Delaware, etc. R. Co.* 73 N. Y. 468 [fall of bridge]; *Texas, etc. R. Co. v. Hamilton*, 66 Tex. 92; 17 S. W. 406 [broken wheel; defective brakes; roadbed uneven].

¹⁰ So held as to coaches (*Anderson v. Scholey*, 114 Ind. 553; 17 N. E. 125; *Bush v. Barnett*, 96 Cal. 202; 31 Pac. 2; *Boyce v. California Stage Co.*, 25 Cal. 460; *Fairchild v. California Stage Co.*, 13 Id. 599; *Lawrence v. Green*, 70 Cal. 417; *McKinney v. Neil*, 1 McLean, 540; *Farish v. Reigle*, 11 Gratt. 697; *Stockton v. Frey*, 4 Gill, 406; *Denver, etc. R. Co. v.*

or the coming off of a wheel,¹¹ or the breaking of a steamboat's paddle or propeller,¹² or the bursting of its boiler,¹³ is presumptive evidence of negligence, in favor of a passenger injured thereby. Indeed, whenever it is made to appear that the accident resulted from defects in defendant's road-bed, machinery, appliances or methods of operating the road, the presumption of negligence arises, and the onus then rests upon the defendant to show that the injuries were caused without its fault.¹⁴ So, evidence that an injury was caused by the wrongful act of a stranger is sufficient, if the act was one which the carrier probably could and ought to have foreseen and guarded

Woodward, 4 Colo. 1; Wall v. Livezey, 6 Id. 465; Lemon v. Chanslor, 68 Mo. 340; Bonner v. Grumbach, 2 Tex. Civ. App. 482; 21 S. W. 1010). So as to railroad cars (St. Louis, etc. R. Co. v. Mitchell, 57 Ark. 418; 21 S. W. 883; Rio Grande Western R. Co. v. Rubenstein, 5 Colo. App. 121; 38 Pac. 76).

¹¹ While the coach was driven at a moderate rate, on a good level road, without coming in contact with any other object, one of the wheels came off; held, that negligence was inferred (Ware v. Gay, 11 Pick. 106).

¹² Yerkes v. Keokuk, etc. Packet Co., 7 Mo. App. 265.

¹³ McMahon v. Davidson, 12 Minn. 357. See Dunlap v. Reliance, 2 Fed. 249.

¹⁴ White v. Boston, etc. R. Co., 144 Mass. 404; 11 N. E. 552 [falling of porcelain lamp shade in car]; Uggala v. West End R. Co., 160 Mass. 351; 35 N. E. 1126 [part of trolley works broke and fell on passenger]; Miller v. Ocean S. S. Co., 118 N. Y. 199; 23 N. E. 462 [break in apparatus for docking ship, not observed or apparent]; Breen v. N. Y. Central R. Co., 109 N. Y. 297; 16 N. E. 60 [swinging door of passing train struck plaintiff's arm]; Gilmore v. Brooklyn Heights R. Co., 6 N. Y.

App. Div. 117; 39 N. Y. Supp. 417 [brake of car flew around suddenly]; Och v. Missouri, etc. R. Co., 130 Mo. 27; 31 S. W. 962 [fall of window]; Palmer v. Delaware, etc. Canal Co., 46 Hun. 486; Clow v. Pittsburgh Traction Co., 158 Pa. St. 410; 27 Atl. 1004 [cable-car stopped suddenly]; Ferry v. Manhattan R. Co., 118 N. Y., 497; 28 N. E. 822 [starting train, while passenger alighting]; Budd v. United Carriage Co., 25 Oreg. 314; 35 Pac. 660 [car-horses ran away]; Memphis, etc. Packet Co. v. McCool, 83 Ind. 392 [passenger injured by a bale of cotton thrown by an employee, on steamboat]. In an action for injuries resulting from an electric shock caused by contact with defendant's street-car while alighting therefrom, evidence that the car was so charged with electricity as to injure a person by contact with any part, establishes a *prima facie* case of negligence (Denver Tramway Co. v. Reid, 4 Colo. App. 53; 35 Pac. 269). A passenger was injured by the bursting of a lamp; held that the burden of proof was on carrier to show affirmatively that the fluid used in the lamp was a safe and proper article (Wilkie v. Bolster, 3 E. D. Smith, 327).

against.¹⁵ But mere proof that something unusual and dangerous happened, without connecting the carrier with the cause or showing that he ought to have anticipated and guarded against it, is not sufficient.¹⁶ Thus, bare evidence that the vehicle suffered a severe shock,¹⁷ or that a missile was flung into it.¹⁸ It must, however, further appear that the particular negligence, thus proved, was the proximate cause of the injury complained of.¹⁹

§ 517. Presumption of negligence, how rebutted. — The carrier is of course at liberty to repel the presumption of negligence when raised,¹ by showing either that the injury was not caused by the accident to which it is attributed by the plaintiff, or that the defendant could not, by the utmost care and

¹⁵ *Hill v. Ninth Ave. R. Co.*, 109 N. Y. 239; 16 N. E. 61 [truck pole running into street-car]. A passenger on the defendant's cars was struck by something from the outside, and her elbow was fractured, no negligence being shown on her part; held, that while the mere fact of the plaintiff's arm being broken would not suffice to convict the defendant of negligence, the facts that the injury happened while the train was passing another car, and that something grazed a long line on the outside of the car in which the plaintiff sat, were sufficient for this purpose (*Holbrook v. Utica, etc. R. Co.*, 12 N. Y. 236). To similar effect, see *Curtis v. Rochester, etc. R. Co.*, 18 Id. 534; *Brehm v. Great Western R. Co.*, 34 Barb. 256.

¹⁶ Proof that deceased was found lying injured, near the track, just after alighting, is not enough, although deceased, while on the train, was obviously ill, and in need of help to reach a place of safety (*Brady v. Old Colony R. Co.*, 162 Mass. 408; 38 N. E. 710). The fact that a passenger is run over by a train is not of itself sufficient to raise a presumption of carrier's neg-

ligence (*Mitchell v. Western, etc. R. Co.* 30 Ga. 22). But proof that a passenger on defendant's train was injured, immediately after alighting at a station, by defendant's locomotive on another track close by, is sufficient (*Philadelphia, etc. R. Co. v. Anderson*, 72 Md. 519; 20 Atl. 2).

¹⁷ *Saunders v. Chicago, etc. R. Co.*, 6 S. Dak. 40; 60 N. W. 148.

¹⁸ *Thomas v. Philadelphia, etc. R. Co.*, 148 Pa. St. 180; 23 Atl. 989 [missile never found]; *Pennsylvania R. Co. v. McKinney*, 124 Pa. St. 462; 17 Atl. 14 [piece of coal].

¹⁹ It is not enough to prove that the injury to the plaintiff was the natural consequence of the negligence of the defendant, but it must also have been the probable consequence, and the injury one which might have been reasonably foreseen with ordinary intelligence (*Davis v. Chicago, etc. R. Co.*, 64 Wisc. 326; 67 N. W. 16).

¹ The fact of the occurrence of an injury not necessarily importing negligence, even if it is *prima facie* proof, is not conclusive proof of negligence (*Bird v. Great Northern R. Co.*, 28 L. J. [Exch.] 3).

diligence have prevented the injury.² Thus the presumption of negligence, which arises from the fact of a train having run off the track, is entirely removed by proof that the displacement of the train was the direct result of the willful act of a stranger,³ or that the sudden weakening of a track which caused a train to be overturned was caused by a violent storm;⁴ although the effect of this evidence may be counteracted in turn by showing that the railway company had reason to anticipate danger to its track, and did not take proper precautions against it. When cars come into collision, it is presumed that both are owned and managed by the owners of the railroad; and this presumption is not removed by evidence that another corporation had power to run cars upon the same road.⁵

§ 518. Evidence.—The subsequent admissions or declarations of an agent or servant of a carrier that an injury to a passenger was caused by his negligence, or that of his co-servants, are not competent evidence as against the carrier; because,

² *Baltimore, etc. R. Co. v. Swann*, 81 Md. 400; 32 Atl. 175; *East Tennessee, etc. R. Co. v. Miller*, 95 Ga. 738; 23 S. E. 660; *Spellman v. Lincoln Transit Co.*, 36 Neb. 890; 55 N. W. 270. Where a passenger is injured the law presumes the carrier negligent, but the presumption is overcome by proof that the passenger was injured by stepping from a moving train (*Chicago, etc. R. Co. v. Landauer*, 39 Neb. 803; 58 N. W. 431). When plaintiff has raised against the carrier a presumption of negligence, it is proper to charge that this presumption can only be rebutted by evidence, on the part of the carrier, that the accident occurred from circumstances against which human prudence and foresight could not guard. This does not mean, that if the jury, looking back at the circumstances of an accident, can see that some course of conduct or precaution would have prevented its occurrence, the carrier

is liable for having failed to pursue that course or omitted that precaution. It is to be deemed as referring to prudence and foresight to be exercised before the accident, and without knowledge that it was about to occur (*Bowen v. N. Y. Central R. Co.*, 18 N. Y. 408).

³ *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9; *Latch v. Rumner R. Co.*, 27 L. J. [Exch.] 155. See *Spear v. Philadelphia, etc. R. Co.*, 119 Pa. St. 61; 12 Atl. 824 [dynamite on boat].

⁴ *Ellet v. St. Louis, etc. R. Co.*, 76 Mo. 518.

⁵ *Ayles v. Southeastern R. Co.*, L. R. 3 Exch. 146. So if any injury happens to a passenger from contact with anything in another car on the road, the presumption is that such thing was under the company's control and it must explain the circumstances, or be liable for the injury (*Walker v. Erie R. Co.*, 63 Barb. 260).

although the agent may have had authority to do the act in connection with which the negligence occurred, such authority does not include an authority to furnish a subsequent narrative of what he did and how he did it. This rule has been applied to the admissions of the captain of a steamer, in an action by a passenger against its owners;¹ to the declarations of a ticket agent in an action against a railroad company;² to those of an engineer, made from ten to thirty minutes after an accident, as to the rate of speed at which his train was running;³ to those of a brakeman, made shortly after an accident, that he had caused it by the misplacing of a switch;⁴ to those of a car driver, made after the car had stopped, but before he had left it, that he could not stop the car, because the brakes were out of order;⁵ and to those of the conductor of a train, as to the bad condition of the road, made a moment before the occurrence of the accident,⁶ and to those of a president, as to the fault of a servant, made to the servant only.⁷ But directions or declarations of a servant, upon which the passenger had a right to rely and did rely,⁸ or the omission of notices which ought to have been given,⁹ are competent. The plaintiff has a right to prove all the circumstances attending the accident, as part of the *res gestæ*;¹⁰ he may show his own position, con-

¹ Union Packet Co. v. Clough, 20 Wall. 528.

² Milwaukee, etc., R. Co. v. Finney, 10 Wisc. 388.

³ Vicksburg, etc. R. Co. v. O'Brien, 119 U. S. 99. Declaration of an engineer, made five minutes after a child had been run over and carried away a quarter of a mile, held inadmissible (Durkee v. Central Pacific R. Co., 69 Cal. 533). See also, as to subsequent declarations of conductor and engineer (Alabama, etc. R. Co. v. Hawk, 72 Ala. 112); and of trainmen (Adams v. Hannibal, etc. R. Co., 74 Mo. 553).

⁴ Patterson v. Wabash, etc. R. Co., 54 Mich. 91.

⁵ Luby v. Hudson River R. Co., 17 N. Y. 131; Whitaker v. Eighth Ave. R. Co., 51 Id. 295; Anderson v. Rome, etc. R. Co., 54 Id. 334.

⁶ Mobile, etc. R. Co. v. Ashcraft, 48 Ala. 15; Jammison v. Chesapeake, etc. R. Co., 92 Va. 327; 23 S. E. 758 [conductor's statement as to where he was at time of accident].

⁷ Lombard, etc. R. Co. v. Christian, 124 Pa. St. 114; 16 Atl. 628 [declarations of president as to driver's negligence].

⁸ Hampton v. Pullman Car Co., 42 Mo. App. 134 [assurance of safety of baggage on seat]; Missouri Pac. R. Co. v. Callahan, [Tex.], 12 S. W. 833 [directions of conductor]; Bullard v. Boston, etc. R., 64 N. H. 27; 5 Atl. 838 [directions to passengers other than plaintiff].

⁹ Missouri Pac. R. Co. v. Callahan [Tex.], 12 S. W. 833 [absence of notice of starting].

¹⁰ Hallahan v. N. Y., Lake Erie, etc. R. Co., 102 N. Y. 194; 6 N. E. 287.

duct and appearance, and may prove what excitement and confusion prevailed among the other passengers, as a result of the accident, for the purpose of showing its nature;¹¹ and he may prove what they did, as evidence of what was deemed prudent by others in the same situation.¹² Evidence of notice to a carrier, contemporaneous with an accident, of the insecure condition of his appliances, is competent to prove his negligence in not keeping them in a safe condition.¹³ The defective condition of a portion of a railroad track, where an accident occurred, cannot be shown by proof that other remote portions were defective.¹⁴ The plaintiff's admission at the time of his injury, as to its cause,¹⁵ that he blames no one but himself,¹⁶ is admissible on behalf of the carrier. Many other points of evidence might be mentioned; but we do not attempt to deal fully with the subject here.¹⁷

Where deceased was on a train which stopped before it reached the station, and deceased got off, and was killed by a passing train, evidence by passengers on the same train, but in different cars, that the train stopped before it reached the station, and the name of the station was called, is admissible (*Merrill v. Eastern R. Co.*, 139 Mass. 252; 29 N. E. 666).

¹¹ *Hallahan v. N. Y., Lake Erie, etc. R. Co.*, *supra*.

¹² *Twomley v. Central Park, etc. R. Co.*, 69 N. Y. 158; *Mobile, etc. R. Co. v. Ashcraft*, 48 Ala. 15. See § 110, *ante*.

¹³ *Parker v. Boston, etc. Steamboat Co.*, 109 Mass. 449.

¹⁴ *Louisville, etc. R. Co. v. Fox*, 11 Bush. 495. Compare cases cited under § 411, *ante*.

¹⁵ *Olivier v. Louisville, etc. R. Co.*, 43 La. Ann. 804; 9 So. 431 [express and tacit].

¹⁶ *Gulzoni v. Tyler*, 64 Cal. 334; and other cases cited under § 110, *ante*.

¹⁷ For cases on evidence offered for the plaintiff, see *Grisim v. Milwaukee R. Co.*, 84 Wisc. 19; 54 N.

W. 104 [malice of driver inadmissible?]; *Texas, etc. R. Co. v. Pierce*, 10 Tex. Civ. App. 429; 30 S. W. 1122 [insult by strangers, when immaterial]; *Keating v. Detroit, etc., R. Co.*, 104 Mich. 418; 62 N. W. 575 [speed material: no bell-cord]; *Hill v. Ninth Ave. R. Co.*, 109 N. Y. 239; 16 N. E. 61 [speed of street-car, when material]; *Hardy v. Milwaukee R. Co.*, 89 Wisc. 183; 61 N. W. 771 [speed of street-car, when not material]; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514; 9 So. 722 [condition of other rails and cross-ties in near vicinity admissible]. For cases on evidence offered by the defendant, see *Louisville, etc. R. Co. v. McEwan*, 98 Ky. 700; 31 S. W. 465 [reputation as evidence of servant's competency and efficiency]; *O'Neil v. Lynn, etc. R. Co.*, 155 Mass. 371; 29 N. E. 630 [admissibility of rules unknown to passenger]; *Augusta R. Co. v. Glover*, 92 Ga. 132; 18 S. E. 406 [passenger's inexperience]; *Ohio, etc. R. Co. v. Voight*, 122 Ind. 288; 23 N. E. 774 [evidence as to construction of cars must relate to car in question].

§ 519. **Contributory negligence of passenger.** — Many illustrations of the rule of contributory negligence, which were given in the chapter on that subject, have been drawn from cases of injuries to passengers by the negligence of carriers, in which the former's negligence, contributing to the injury, was set up by way of defense. Referring to that chapter for a more complete statement of the subject, we shall only give in this case some further illustrations of what is, and what is not, such contributory negligence on the part of a passenger, as will defeat his action against the carrier. It is deemed contributory negligence, within the rule, for a passenger to do any voluntary act which unnecessarily exposes him to the risk of injury, or to omit any proper precautions against it.¹ As a general rule, he cannot recover for an injury to his arm or head, while improperly projecting out of the window of a railroad car or a stage;²

¹ *Laffin v. Buffalo, etc. R. Co.*, 106 N. Y. 136; 12 N. E. 599 [stepping from car without looking for platform]; *Hanrahan v. Manhattan R. Co.*, 53 Hun. 420; 6 N. Y. Supp. 395 [stepping on platform without looking at it]; *Palmer v. Penn. Co.*, 111 N. Y. 488; 18 N. E. 859 [neglecting to use hand-rail on icy platform]. A passenger who unnecessarily exposes himself to danger while alighting from a train is guilty of contributory negligence, though he does not know of the dangers to which he is exposed (*Ill. Central R. Co. v. Davidson*, 12 C. C. A. 118; 64 Fed. 301). Willful disobedience of reasonable orders is negligence (*Dodge v. Boston, etc. S. S. Co.*, 148 Mass. 207; 19 N. E. 373; *Tillett v. Lynchburg, etc. R. Co.*, 115 N. C. 662; 20 S. E. 480 [entering car not intended for train, in spite of warning]). A passenger who provokes an assault by using abusive language, cannot recover from the carrier (*Harrison v. Fink*, 42 Fed. 787; *Scott v. Central Park, etc. R. Co.*, 53 Hun. 414; 6 N. Y. Supp. 382). As in other cases, a passenger's negligence,

which is not a proximate cause of the injury, does not bar a recovery (*Atchison, etc. R. Co. v. Hughes*, 55 Kans. 491; 40 Pac. 919 [slight inattention]).

² *Holbrook v. Utica, etc. R. Co.*, 12 N. Y. 236; *Dun v. Seaboard, etc. R. Co.*, 78 Va. 645; *Pittsburgh, etc. R. Co. v. Andrews*, 39 Md. 329; *Indianapolis R. Co. v. Rutherford*, 29 Ind. 82; *Louisville, etc. R. Co. v. Sickings*, 5 Bush. 1. This defense is available, not only to the carrier, but to any stranger causing injury to a passenger (*Moore v. Edison Electric Co.*, 43 La. Ann. 792; 9 So. 433; *Favre v. Louisville, etc. R. Co.*, 91 Ky. 541; 16 S. W. 370 [hand outside of window]). Resting an elbow on the *inside* of the window-sill is not contributory negligence, though an injury be suffered partly in consequence thereof (*Farlow v. Kelly*, 108 U. S. 288; 2 S. Ct. 555; *Winters v. Hannibal, etc. R. Co.*, 39 Mo. 468; *Hallahan v. N. Y., Lake Erie, etc. R. Co.*, 102 N. Y. 194; 6 N. E. 287; *Germantown Pass. R. Co. v. Brophy*, 105 Pa. St. 38; *Carrico v. West Va., etc. R. Co.*, 35 W. Va. 389; 14 S. E.

and in many instances, it has been held that such an act is negligence, as matter of law;³ but it is sometimes held to be a question of mixed law and fact.⁴ The true rule seems to be that the projection of the body, in such a case, may be excused by special circumstances, but, in default of some good excuse, is to be deemed negligence *per se*.⁵ A passenger ought not to be deemed guilty of contributory negligence when he takes only such risk as, *under the same circumstances*, a prudent man,⁶ whose senses were not impaired,⁷ would take. So, if a train stops near a station, but without reaching the platform, and the descent from the car to the ground is so precipitate as to injure a passenger, this is not conclusive evidence of his having contributed to his injury by his own fault. If the conductor refused to move the train to the platform, or if the train was

12.) See generally cases cited under §§ 96, 101, *ante*; *Miller v. St. Louis R. Co.*, 5 Mo. App. 471 [slight exposure not negligence *per se*]; *Spencer v. Milwaukee, etc. R. Co.*, 17 Wisc. 487. A passenger is not bound to examine window-sills, before resting on them (*Gulf, etc. R. Co. v. Killebrew [Tex.]*, 20 S. W. 182).

³ *Pittsburgh, etc. R. Co. v. McClurg*, 56 Pa. St. 294 [overruling *New Jersey, etc. R. Co. v. Kennard*, 21 Id. 203]; *Butler v. Pittsburgh, etc. R. Co.*, 139 Id. 195; 21 Atl. 500; *Pittsburgh, etc. R. Co. v. Andrews*, 39 Md. 329; *Todd v. Old Colony, etc. R. Co.*, 3 Allen, 18; s. c., 7 Id. 267; *Holbrook v. Utica, etc. R. Co.*, 12 N. Y. 236; *Indianapolis, etc. R. Co. v. Rutherford*, 29 Ind. 82; *Richmond, etc. R. Co. v. Scott*, 88 Va. 958; 14 S. E. 763; *Dun v. Seaboard, etc. R. Co.*, 78 Va. 645; *Carrico v. West Va. etc. R. Co.*, 35 W. Va. 389; 14 S. E. 12; *Georgia Pac. R. Co. v. Underwood*, 90 Ala. 49; 8 So. 116.

⁴ *Francis v. N. Y. Steam Co.*, 114 N. Y. 380; 21 N. E. 988; *Quinn v. South Carolina R. Co.* 29 S. C. 381; 7 S. E. 614 [elbow projecting]; *Moakler v. Willamette Val. R. Co.*,

18 Oreg. 189; 22 Pac. 948 [same, but doubtful whether injury at all due to this]. s. p., *Sanderson v. Frazier*, 8 Colo. 79; 5 Pac. 632.

⁵ This would seem to reconcile all the leading cases. Thus, a passenger is not deemed negligent for allowing his body to project beyond the vehicle in any manner required by its construction, as, for example, riding on the outer edge of a stage-sleigh (*Spooner v. Brooklyn R. Co.*, 54 N. Y. 230; *rev'g* 36 Barb. 217).

⁶ *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; *Delmatyr v. Milwaukee, etc. R. Co.*, 24 Wisc. 578; *Lambeth v. North Carolina R. Co.*, 66 N. C. 494; *Keating v. N. Y. Central R. Co.*, 3 Lans. 469. It is not negligence for passenger to leave his seat in the car after the conductor has called the name of the station, but before the car has stopped (*Newton v. Central Vt. R. Co.* 80 Hun, 491; 30 N. Y. Supp. 488. s. p., *Colwell v. Manhattan R. Co.*, 57 Hun, 452; 10 N. Y. Supp. 636).

⁷ *Renneker v. South Carolina R. Co.*, 20 S. C. 219; *Washington v. Spokane R. Co.*, 13 Wash. St. 9; 42 Pac. 628.

so long as to make it impossible to bring all the cars to a proper landing-place, and there was not time to pass through to the cars which stood next to the platform, no sensible man would hesitate to risk a moderate leap, rather than be carried miles away from home.⁸ And, if common experience had shown the incivility of the conductor, a prudent passenger would not waste time in asking favors of him. In all these and similar cases, a person might directly contribute to his own injury, and yet act prudently in taking the risk. He ought not, therefore, to be precluded from recovering damages. An act of a passenger, in obedience to the direction of the persons in charge of the vehicle (such as the driver of a stage or the conductor of a train), cannot be deemed negligent,⁹ unless so palpably opposed to common prudence as to make it a clear act of folly.¹⁰ Where a passenger laid his hand upon the inside of a car door, and it was crushed by the sudden closing of the door by the guard, it was held that his act was not necessarily so negligent as to deprive him of all claim for damages.¹¹ It

⁸ In *Foy v. London, etc. R. Co.* (18 C. B. N. S. 225), it appeared that the train was longer than the platform, and that the plaintiff, a lady passenger, was injured by jumping from the step of a rear carriage, as she was advised to do by a porter. Held, that a verdict for plaintiff could not be set aside. The case of *Siner v. Great Western R. Co.* (L. R. 3 Exch. 150; 4 Id. 117), though it limits the effect of this decision, is not inconsistent with it.

⁹ *Prothero v. Citizens' R. Co.* 134, Ind. 431; 33 N. E. 765; *Kentucky, etc. Bridge Co. v. Quinkert*, 2 Ind. App. 244; 28 N. E. 338. See *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; aff'd 43 Barb. 532. A railroad company cannot allege that a passenger is in fault obeying specific instructions of the conductor, instead of general directions of which he has been informed (*Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526; see also *Foy v. London, etc. R. Co.*,

18 C. B. N. S. 225). A passenger may recover for injuries suffered by getting off a train in somewhat rapid motion, if urged to do so by a conductor in charge (*Jones v. Chicago, etc. R. Co.*, 42 Minn. 183; 43 N. W. 1114). See many more illustrations of this in the next section.

¹⁰ A passenger is responsible for the result of placing himself in a position of obvious peril, even if permitted or encouraged to do so by servants of the carrier (*Aufdenberg v. St. Louis, etc. R. Co.*, 132 Mo. 565; 34 S. W. 485). s. p., *Ginnon v. Harlem R. Co.*, 3 Robertson, 25.

¹¹ *Fordham v. London, etc. R. Co.*, L. R. 4 C. P. 619; aff'd s. p., 3 C. P. 368; *Coleman v. Southeastern R. Co.*, 4 Hurlst. & C. 699. Where, however, a similar accident happened to a passenger who kept his hand on the door-post for some time after he had entered the carriage, the guard having called out to passengers to take their seats, it was

has been frequently adjudged that a passenger who, under reasonable apprehension of a collision or other accident, changes his position to one in fact more dangerous, or even leaps from the vehicle while in motion, is not guilty of negligence, if the act was one which a reasonable man, under similar circumstances, would probably have done.¹² The law does not require of passengers the exercise, in imminent peril, of all the presence of mind and care of a prudent man; but the circumstances will be left to the jury, to say from them whether the party acted rashly and under undue apprehension of danger.¹³ A passenger is not to blame for not foreseeing events which are not common in the business, as generally carried on, even though they are common in the business of the particular carrier with whom he has to do.¹⁴ Much less is he to blame for not fore-

held that he could not recover (*Richardson v. Metropolitan R. Co.*, 37 L. J. [C. P.] 300). *S. P., Texas, etc. R. Co. v. Overall*, 82 Tex. 247; 18 S. W. 142. In *Baker v. Manhattan R. Co.* (118 N. Y. 533; 23 N. E. 885), plaintiff was allowed to retain a verdict, where the door swung to, from the mere jar of the train. In somewhat similar cases, such an accident has been held to involve no fault on either side, and therefore no liability (*Murphy v. Atlanta, etc. R. Co.*, 89 Ga. 832; 15 S. E. 774; *Hardwick v. Georgia R. Co.*, 85 Ga. 507; 11 S. E. 832).

¹² *Twomley v. Central Park, etc. R. Co.*, 69 N. Y. 158; *Buel v. N. Y. Central R. Co.*, 31 Id. 314; *Cody v. N. Y. & New England R. Co.*, 151 Mass. 462; 24 N. E. 402; *Pederson v. Seattle R. Co.*, 6 Wash. St. 202; 33 Pac. 351; 34 Id. 665; *St. Louis, etc. R. Co. v. Maddry*, 57 Ark. 306; 21 S. W. 472; *Woods v. Southern Pac. Co.*, 9 Utah, 146; 33 Pac. 638; *Frink v. Potter*, 17 Ill. 406; *Ingalls v. Bills*, 9 Metc. 1; *Jones v. Boyce*, 1 Starkie, 493. See *Eldridge v. Long Island R. Co.*, 1 Sandf. 89; *Wilson v. Northern Pacific R. Co.*, 26 Minn.

278; *Iron R. Co. v. Mowery*, 36 Ohio St. 418. To same effect, *St. Joseph, etc. R. Co. v. Hedge*, 44 Neb. 448; 62 N. W. 887.

¹³ *Galena, etc. R. Co. v. Yarwood*, 17 Ill. 509; *Saltonstall v. Stockton, Taney*, 11, 21; *Walter v. Chicago, etc. R. Co.*, 39 Iowa, 33; *Pittsburgh, etc. R. Co. v. Martin*, 82 Ind. 476; *Lawrence v. Green*, 70 Cal. 417; 11 Pac. 750.

¹⁴ Plaintiff was in the waiting-room of a city railroad, waiting to be taken to her destination. Seeing a car coming in, she went out to enter it, and the car then being transferred from one track to another, sideways, by means of a movable slide, her foot was caught in the slide, and she was badly injured. Held, that there was no want of care on her part, as she could not be expected to anticipate a sideway movement of the car (*Gordon v. Grand St., etc. R. Co.*, 40 Barb. 546). Since a person, riding on a footboard of a street car, is not required to anticipate danger from the proximity of trolley poles, his failure to listen for warnings by the conductor against such poles does

seeing and taking precautions against a collision or other accident.¹⁵ He has the right to assume that he will not be exposed to any unnecessary danger, when in any place provided for the accommodation of passengers; it was so held where a car projected about five inches over a platform and struck a waiting passenger.¹⁶ Passengers may not, however, blindly rely upon the carrier's observance of his own rules. They must use such care as reasonable persons would, to avoid danger from a possible omission of such observance.¹⁷ Of course, no negligence on the part of a passenger is of any importance, if it did not proximately contribute to his injury.¹⁸

§ 520. Getting on or off moving vehicle.—The act of getting on or off a vehicle, while in motion, is always sufficient evidence of a passenger's negligence to go to a jury;¹ and if

not render him guilty of contributory negligence (*Elliott v. Newport R. Co.*, 18 R. I. 707; 31 Id. 694).

¹⁵ *Willis v. Long Island R. Co.*, 32 Barb. 398; *aff'd*, 34 N. Y. 670. A passenger has a right to presume that due care will be exercised to prevent a collision and to act accordingly (*Walter v. Chicago, etc. R. Co.*, 39 Iowa, 33). Hence, his not taking the first vacant seat he came to, or being incumbered with bundles or with the care of children, which impeded his movements, will not bar his recovery for a rear-end collision (*Tillett v. Norfolk, etc. R. Co.*, 118 N. C. 1031; 24 S. E. 111). Asking for a delay of the train is not contributory negligence, even though a collision ensues which would not have happened but for such delay (*Flinn v. Philadelphia, etc. R. Co.*, 1 Houst. 469).

¹⁶ *Dobiecki v. Sharp*, 88 N. Y. 203.

¹⁷ *Chaffee v. Old Colony R. Co.*, 17 R. I. 658; 24 Atl. 141.

¹⁸ So held, where passengers moved from one car to another (*Webster v. Rome, etc. R. Co.*, 115 N. Y. 112; 21 N. E. 725; *Jones v. Chicago, etc. R.*

Co., 43 Minn. 279; 45 N. W. 444; *Ky. Central R. Co. v. Thomas*, 79 Ky. 160). And so, where passenger alighted on the wrong side of a street (*North Chicago R. Co. v. Eldridge*, 151 Ill. 542; 38 N. E. 246). A passenger wrongfully ejected from train is not precluded from recovery for an injury caused by his resistance (*Louisville, etc. R. Co. v. Wolfe*, 128 Ind. 347; 27 N. E. 606).

¹ *Hunter v. Cooperstown, etc. R. Co.*, 126 N. Y. 18; 26 N. E. 958; *Johanns v. National Accident So.*, 16 N. Y. App. Div. 105; 45 N. Y. Supp. 117; *Schaefer v. St. Louis, etc. R. Co.*, 128 Mo. 64; 30 S. W. 331. "If all you know is that a passenger jumps from a train in motion and is injured, you would charge him with carelessness for the act. The act is *prima facie* negligence. But the question whether the case belongs to the court or the jury for decision, arises when the excuse offered for the act is considered. Whether a justification exists or not depends upon the speed of the train and other circumstances" (*Shannon v. Boston, etc. R. Co.*, 78 Me. 52).

the vehicle is part of a steam railway train, there is so strong a presumption of negligence, as to require some substantial explanation or excuse to sustain a finding that it was not negligent,² especially if the train is in rapid motion,³ or, though

¹ Lucas v. New Bedford, etc. R. Co., 6 Gray, 64; Gavett v. Manchester, etc. R. Co., 16 Id. 501; Illinois Central R. Co. v. Slatton, 54 Ill. 133 [getting off]; Ohio, etc. R. Co. v. Stratton, 78 Id. 88 [same]; Chicago, etc. R. Co. v. Scates, 90 Ill. 586 [same]; Lambeth v. North Carolina R. Co., 66 N. C. 494. In Burrows v. Erie R. Co., 63 N. Y. 556, Rapallo, J., said: "The cases in which a recovery has been allowed notwithstanding that the passenger undertook to leave the car while in motion are exceptional and depend upon peculiar circumstances. In short, as we now understand the rule established by the decisions, it is presumptively a negligent act for a passenger to attempt to alight from a moving train, and it is not sufficient to rebut the presumption that the trainmen acquiesced in the action of the passenger or that the company violated its duty or contract in not stopping the train, or that to remain on the train would subject the passenger to trouble or inconvenience, but that to excuse such an act and free the plaintiff from the charge of contributory negligence, there must be a coercion of circumstances which did not leave the passenger in the free and untrammelled possession of his faculties and judgment." S. P., Kline v. Central Pacific R. Co., 37 Cal. 400; Southwestern R. Co. v. Singleton, 67 Ga. 306. This language has since been approved and applied with stringency to attempts to *get on* steam trains in motion (Hunter v. Cooperstown, etc. R. Co., 112 N. Y. 371; 19 N. E. 820; s. c., again, 126

N. Y. 18; 26 N. E. 958 [four miles an hour]); and on this authority it has been held that one who is injured in boarding a train while it is moving two miles an hour is guilty of contributory negligence, though the conductor told him to jump on (Myers v. N. Y. Central R. Co., 88 Hun, 619; 34 N. Y. Supp. 807). But this decision was overruled in Distler v. Long Island R. Co. (151 N. Y. 424; 45 N. E. 937; rev'g 78 Hun, 252; 28 N. Y. Supp. 865), where it was held not negligence, as matter of law, for a passenger to get upon a train, in pursuance of the direction of the conductor, while it is moving at the rate of two or three miles an hour, where there is nothing to indicate any unusual or peculiar danger. And it is held that the rule does not apply to getting off, and that a passenger in attempting to alight from a slowly moving train is not guilty of negligence *per se*, but the question depends upon the circumstances and is generally for the jury (Lewis v. Delaware, etc. Canal Co., 145 N. Y. 508; 40 N. E. 248). In Pennsylvania, the doctrine of Judge Rapallo is applied to both getting on and getting off trains (Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113; 18 Atl. 759). In all states, in extreme cases, the question cannot be left to the jury (Hoehn v. Chicago, etc. R. Co., 152 Ill. 223; 38 N. E. 549).

³ Jarrett v. Atlanta, etc. R. Co., 83 Ga. 347; 9 S. E. 681; Louisville, etc. R. Co. v. Depp, Ky.; 33 S. W. 417; St. Louis, etc. R. Co. v. Rosenberry, 45 Ark. 256; 11 S. W. 212 [speed ten miles an hour].

moving slowly, is rapidly increasing its speed.⁴ But an attempt to get on⁵ or off⁶ even a steam train in motion is not negligence *per se*, incapable of justification; and much less is such a rule applied to street-cars or stage-coaches.⁷ The question is always whether the act is one which is consistent with prudence, under all the circumstances.⁸ It is now universally held that the strict rule applied in this respect to trains drawn by steam power is much relaxed, as to street-cars, drawn by horses⁹ or propelled by electric power.¹⁰ Such cars are usually not allowed to move at high speed; and passengers have a right to presume that they are under full control; although not when the fact is obviously otherwise.¹¹ It is also very often the custom of those in charge of such cars not to make a full stop for passengers, either boarding or alighting; and on

⁴ In *Solomon v. Manhattan R. Co.*, (31 Hun, 5; *aff'd*, 103 N. Y. 437), the train was moving slowly, but rapidly increasing speed. Decedent jumped on and persisted in hanging on. Nonsuit proper.

⁵ *Baltimore, etc. R. Co. v. Kane*, 69 Md. 11; 13 Atl. 387; *Birmingham R. Co. v. Clay*, 108 Ala. 233; 19 So. 309; *Fulks v. St. Louis, etc. R. Co.*, 111 Mo. 335; 19 S. W. 818.

⁶ *Chicago, etc. R. Co. v. Byrum*, 153 Ill. 131; 38 N. E. 578; *Covington v. Western, etc. R. Co.*, 81 Ga. 273; 6 S. E. 593; *Louisville, etc. R. Co. v. Crunk*, 119 Ind. 542; 21 N. E. 31; *Pennsylvania Co. v. Marion*, 123 Ind. 415; 23 N. E. 973 [two miles an hour: question for jury]; *Atchison, etc. R. Co. v. Hughes*, 55 Kans. 491; 40 Pac. 919. See *Phillips v. Rensselaer, etc. R. Co.*, 49 N. Y. 177, 182.

⁷ As to cars, see note 9, *infra*. As to coaches, see *Frobisher v. Fifth Ave. Tr. Co.*, 81 Hun, 544; 30 N. Y. Supp. 1099.

⁸ In determining the question of plaintiff's negligence in stepping from a moving train, the jury should consider the age, sex, and physical condition of the plaintiff, and, if a

reasonably prudent person of such character would not have made the attempt, there is contributory negligence, preventing a recovery (*Little Rock, etc. R. Co. v. Tankersly*, 54 Ark. 25; 14 S. W. 1099). An aged passenger, who alighted from moving street-car was nonsuited, though driver failed to stop on request (*Outen v. North, etc. St. R. Co.*, 94 Ga. 662; 21 S. E. 710).

⁹ *Terre Haute, etc. R. Co. v. Buck*, 96 Ind. 346.

¹⁰ The reasons for this are well stated in *Cicero, etc. R. Co. v. Meixner*, 160 Ill. 320; 43 N. E. 823, and see *Citizens' R. Co. v. Spahr*, 7 Ind. App. 23. The point has been often decided, before and since these cases. See note 13, *infra*.

¹¹ It is gross negligence in a passenger on a street railway to jump from the car when it is going at a speed of twenty miles an hour, whether he knows or does not know that the car is going so fast, and although such cars are forbidden to run more than seven miles an hour (*Masterson v. Macon R. Co.*, 88 Ga. 436; 14 S. E. 591).

some lines, passengers could never ride, if they waited for cars to stop. Accordingly it was held, first as to horse-cars,¹² and afterwards as to electric cars,¹³ that it is for the jury to decide, in almost every case, whether a passenger was in fault for getting on or off a street-car, while moving slowly; although it is made a condition, in several cases, that a suitable signal of his intention should first be given.¹⁴ But a jury cannot be allowed to excuse such an act, without further evidence, where the car was moving rapidly,¹⁵ or where the passenger, trying to enter, fails to get a safe foothold and persists in struggling to get on, when he could quite safely drop off,¹⁶ or in any other way acts

¹² *McDonough v. Metropolitan R. Co.*, 137 Mass. 210; *Briggs v. Union R. Co.*, 148 Id. 72; 19 N. E. 19; *Morrison v. Broadway, etc. R. Co.*, 130 N. Y. 166; 29 N. E. 105; *Wyatt v. Citizens R. Co.*, 55 Mo. 485 [horse-car]; *North Chicago R. Co. v. Williams*, 140 Ill. 275; 29 N. E. 673 [horse-car]; *Schacherl v. St. Paul R. Co.*, 42 Minn. 42; 43 N. W. 837. In all these cases the passenger was trying to get on the car. "Ordinarily it is perfectly safe to get upon a street-car moving slowly. . . . There may be exceptional cases. . . . But in most cases it must be a question for the jury" (*Eppendorf v. Brooklyn, etc. R. Co.*, 69 N. Y. 195 [horse-car]).

¹³ So held where passenger tried to get on (*Corlin v. West End R. Co.*, 154 Mass. 197; 27 N. E. 1000; *Cicero R. Co. v. Meixner*, 160 Ill. 320; 43 N. E. 823; *White v. Atlanta R. Co.*, 92 Ga. 494; 17 S. E. 673; *Sahlgaard v. St. Paul R. Co.*, 48 Minn. 232; 51 N. W. 111; *Central Pass. R. Co. v. Rose*, Ky. ; 22 S. W. 745; *Omaha R. Co. v. Martin*, 48 Neb. 65; 66 N. W. 1007). A person attempting to board an electric street-railway car while in motion assumes the risks of injury only from the ordinary movements of the car (*Schepers v. Union*

Depot R. Co., 126 Mo. 665; 29 S. W. 712). So held also as to getting off (*Lacas v. Detroit R.*, 92 Mich. 412; 52 N. W. 745; *Walters v. Collins Park R. Co.*, 95 Ga. 519; 20 S. E. 497; *Ober v. Crescent City R. Co.*, 44 La. Ann. 1059; 11 So. 818). But it is negligence to attempt to board a street cable-car when in rapid motion (*Chicago R. Co. v. Delcourt*, 33 Ill. App. 430).

¹⁴ A street railroad company is not liable for injury to one who attempts to board a moving car without signaling it to stop (*Woo Dan v. Seattle R. Co.*, 5 Wash. St. 466; 32 Pac. 103). See *Corlin v. West End R. Co.*, 154 Mass. 197; 27 N. E. 1000). s. p., as to passenger alighting without signal (*White v. West End R. Co.*, 165 Mass. 522; 43 N. E. 298; *McDonald v. Montgomery R. Co.*, 110 Ala. 161; 20 So. 317).

¹⁵ See note 11, *supra*. The refusal of those in charge of a horse-car to stop it as requested, does not justify even a child of tender years in jumping from the front platform while the car is in full motion (*Cram v. Metrop. R. Co.*, 112 Mass. 38).

¹⁶ *Phillips v. Rensselaer, etc. R. Co.*, 49 N. Y. 177. See *Solomon v. Manhattan R. Co.*, 103 N. Y. 437; 9 N. E. 430.

without proper care.¹⁷ More care and caution must be used in entering or alighting from a moving car than might be required if it were stationary.¹⁸ Where two or more electric street-cars are fastened together, more caution must be used in entering them, while in motion, than where each car is separate. And electric trains, commonly running at high speed, outside of city limits, are hardly distinguishable from steam trains, for the purpose of these questions. Of course no negligence can be imputed to one getting off, while a train was in motion, if he neither knew nor ought to have known the fact.¹⁹ If the conductor directed, or even advised, a passenger to get on or off without stopping the car, the latter would have a right to rely upon this advice,²⁰ provided there was no obvious danger in

¹⁷ *Calderwood v. North Birmingham R. Co.*, 96 Ala. 318; 11 So. 66 [alighting in violation of rules]; *Victor v. Pennsylvania R. Co.*, 164 Pa. St. 195; 30 Atl. 381 [jumping off backwards]; *Richmond v. Second Ave. R. Co.*, 76 Hun, 233; 27 N. Y. Supp. 780 [stepping off backwards]; *Weber v. Kansas City R. Co.*, 100 Mo. 191; 12 S. W. 804 [giving no signal and not looking]; *Chicago, etc. R. Co. v. Landauer*, 36 Neb. 642; 54 N. W. 976 [jumping off without looking]; *N. Y., Lake Erie, etc. R. Co. v. Lyons*, 119 Pa. St. 324; 13 Atl. 205 [using known dangerous step in dark]; *Brown v. Barnes*, 151 Pa. St. 562; 25 Atl. 144 [passenger alighted from moving car after seeing one immediately in front of him fall in getting off].

¹⁸ *Ricketts v. Birmingham R. Co.*, 85 Ala. 600; 5 So. 353 [alighting with keg of lead in hand]; *Reddington v. Philadelphia Tr. Co.*, 132 Pa. St. 154; 19 Atl. 28 [boarding with dinner bucket in hand]; *Richmond, etc. R. Co. v. Pickleseimer*, 85 Va. 798; 10 S. E. 44 [valise in hand on rainy night]; *McMurtry v. Louisville, etc. R. Co.*, 67 Miss. 601; 7 So. 401 [boarding train on dark and cold night, with valise in hand].

¹⁹ *Merritt v. N. Y., New Haven, etc. R. Co.*, 162 Mass. 326; 38 N. E. 447; *Mahar v. N. Y. Central R. Co.*, 5 N. Y. App. Div. 22; 39 N. Y. Supp. 63.

²⁰ *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; 59 Id. 352; 68 Id. 124; *Lambeth v. North Carolina R. Co.*, 66 N. C. 494; *East Tennessee, etc. R. Co. v. Conner*, 15 Lea, 254. See *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; 43 Barb. 532, on a similar point; see also *Bucher v. N. Y. Central R. Co.*, 98 N. Y. 128. So held where conductor induced passenger to get on (*Kansas, etc. R. Co. v. Dorough*, 72 Tex. 108; 10 S. W. 711; *Murphy v. St. Louis, etc. R. Co.*, 43 Mo. App. 342; *Montgomery, etc. R. Co. v. Stewart*, 91 Ala. 421; 8 So. 708); or to get off (*Watkins v. Raleigh, etc. R. Co.*, 116 N. C. 961; 21 S. E. 409; *Eddy v. Wallace*, 1 C. C. A. 435; 49 Fed. 801; *Lewis v. Delaware, etc. Canal Co.*, 145 N. Y. 508; 40 N. E. 248; *Cincinnati, etc. R. Co. v. Carper*, 112 Ind. 26; 14 N. E. 352; *Louisville, etc. R. Co. v. Holsapple*, 12 Ind. App. 301; 38 N. E. 1107; *McCaslin v. Lake Shore, etc. R. Co.* 93 Mich. 553; 53 N. W. 724; *Jones v. Chicago, etc. R. Co.*, 42 Minn. 183; 43 N. W. 1114). The calling of the station and opening and fasten-

doing so, but not otherwise.²¹ One who, under the influence of a sudden alarm given by a trainman, or under coercion, leaps from a train in motion, in obedience to directions, is not thereby debarred from recovering for injuries thus caused.²² The mere fact that the conductor of a train prematurely announces its arrival at a station does not justify a passenger, destined for that station, in jumping off before the train stops;²³ and even where a passenger is carried beyond his proper station, by the fault of the company, he cannot recover from an injury suffered by him in leaping from the train while in *rapid* motion.²⁴ But, if the train is moving very slowly, it is for the

ing back of the car door by defendant's brakeman, held not an invitation to passenger to step off a moving train (*England v. Boston, etc. R. Co.*, 153 Mass. 490; 27 N. E. 1).

²¹ *Hunter v. Cooperstown, etc. R. Co.*, 112 N. Y. 371; 19 N. E. 820; s. c. again, 126 N. Y. 81; 26 N. E. 958 [four to six miles an hour]; *McDonald v. Boston, etc. R.*, 87 Me. 466; 32 Atl. 1010; *Rothstein v. Pennsylvania R. Co.*, 171 Pa. 620; 33 Atl. 379; *Bardwell v. Mobile, etc. R. Co.*, 63 Miss. 574 [six to twelve miles an hour]; *East Tenn. etc. R. Co. v. Hughes*, 92 Ga. 388; 17 S. E. 949; *Whitlock v. Comes*, 57 Fed. 565; *Louisville, etc. R. Co. v. Depp*, Ky. ; 33 S. W. 417 [train in rapid motion: direction equivocal]. This condition is specified in several cases, cited in note 20, *supra*. Although a conductor tells passengers "to go forward," one of them is not justified in jumping to the ground from the side door of a baggage-car where he cannot see where or upon what he is jumping (*Geogheghan v. N. Y., New Haven, etc. R. Co.*, 10 N. Y. App. Div. 454; 42 N. Y. Supp. 205).

²² *McPeak v. Missouri Pac. R. Co.*, 128 Mo. 617; 30 S. W. 170 [alarm]. See, as to coercion, *Burrows v. Erie R. Co.*, 63 N. Y. 556.

²³ *East Tennessee, etc. R. Co. v. Holmes*, 97 Ala. 332; 12 So. 286 [jumping off train in motion, in the dark]; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; see *Gonzales v. Harlem R. Co.*, 33 N. Y. Superior, 57. The ringing of the engine bell by the conductor is not sufficient ground to induce a passenger to believe the train has stopped (*East Tenn., etc. R. Co. v. Massengill*, 15 Lea, 328). But see *Memphis, etc. R. Co. v. Stringfellow*, 44 Ark. 322. In England, it is held that the mere stopping of a train and calling out the name of a station is no evidence of an invitation to alight (*Lewis v. London, Chatham, etc. R. Co.*, L. R., 9 Q. B. 66; *Bridges v. North London R. Co.*, L. R., 6 Q. B. 377).

²⁴ If a passenger, by the negligence of the company, is carried beyond the station where he has a right to be let off, he can recover for the inconvenience, loss of time, and labor of traveling back; but if he leaps off without waiting for the train to stop, he does it at his own risk (*Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Reibel v. Cincinnati, etc. R. Co.*, 114 Ind. 476; 17 N. E. 107; *Burgin v. Richmond, etc. R. Co.*, 115 N. C. 673; 20 S. E. 473; *Atlanta, etc. R. Co. v. Dickerson*, 89 Ga. 455; 15 S. E. 534; *Watson v. Georgia Pac. R.*

jury to say whether it is negligent or not to jump off under such circumstances.²⁵ A carrier certainly cannot complain that a passenger did *not* jump off a moving train, to avoid a collision.²⁶ A passenger is not in fault for merely rising from his seat, and going to the door, getting ready to leave the car, as soon as he has reason to expect that the car will stop, even though he is exposed to danger by his position.²⁷ Of course,

Co., 81 Ga. 476; 7 S. E. 854; Savannah, etc. R. Co. v. Watts, 82 Ga. 229; 9 S. E. 129; Blodgett v. Bartlett, 50 Ga. 353; Louisville, etc. R. Co. v. Lee, 97 Ala. 325; 12 So. 48; Walker v. Vicksburg, etc. R. Co., 41 La. Ann. 795; 6 So. 916; Butler v. St. Paul, etc. R. Co., 59 Minn. 135; 60 N. W. 1090; White v. West End R. Co., 165 Mass. 522; 43 N. E. 298 [electric car]; Sculley v. N. Y., Lake Erie, etc. R. Co., 80 Hun, 197; 30 N. Y. Supp. 61). S. P., as to passenger sent to wrong train (Rothstein v. Penn. R. Co., 171 Pa. St. 620; 33 Atl. 379; St. Louis, etc. R. v. Atchison, 47 Ark. 74; 14 S. W. 468). So held, where a passenger leaped in the dark from a train going seven to ten miles (Penn. R. Co. v. Aspell, 23 Pa. St. 147); or fifteen miles an hour (Dougherty v. Chicago, etc. R. Co., 86 Ill. 467; Ill. Central R. Co. v. Green, 81 Id. 19; Jewell v. Chicago, etc. R. Co., 54 Wisc. 610). But where a boy, ten years old, became frightened because train did not stop, and jumped from the train as it passed the station, the conductor using no precaution to prevent him from jumping, defendant held liable (Hemmingway v. Chicago, etc. R. Co., 72 Wisc. 42; 37 N. W. 804). Though a conductor may forcibly prevent a passenger leaving a train, he is not bound to do so; a request is sufficient, and if unheeded, the passenger takes the risk (Aufdenberg v. St. Louis, etc. R. Co., 132 Mo. 565; 34 S. W. 485).

²⁵ Carr v. Eel River, etc. R. Co., 98

Cal. 366; 33 Pac. 213; Rothstein v. Pennsylvania R. Co., 171 Pa. St. 620; 33 Atl. 379; Jones v. Baltimore, etc. R. Co., 21 D. C. 346; Filer v. N. Y. Central R. Co., 49 N. Y. 47; Delamater v. Milwaukee, etc. R. Co., 24 Wisc. 578. Where a mother was separated from young children by the starting of a train, she was held justified in jumping off to join them, while the train was moving slowly (Penn. R. Co. v. Kilgore, 32 Pa. St. 292; Lloyd v. Hannibal, etc. R. Co., 53 Mo. 509). In Burrows v. Erie R. Co. (63 N. Y. 556), held that a woman should have been unsuited who attempted, with the assistance of a friend, to step from a moving train, she being encumbered with a handbox and satchel, though the train had stopped at her station and started before she had time to alight.

²⁶ Hanson v. Minneapolis, etc. R. Co., 37 Minn. 355; 34 N. W. 223; Wabash, etc. R. Co. v. Shacklet, 105 Ill. 364; see also Alabama, etc. R. Co. v. Davis, 69 Miss. 444; 13 So. 698 [failure to jump from carriage, on collision with train].

²⁷ Wylde v. Northern R. Co., 53 N. Y. 156; Baker v. Manhattan R. Co., 118 N. Y. 533; 23 N. E. 885 [passenger opening door]; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113; 18 Atl. 759; Nichols v. Sixth Ave. R. Co., 38 N. Y. 131; Worthen v. Grand Trunk R. Co., 125 Mass. 99; Harmon v. Washington, etc. R. Co., 7 Mackey [D. C.], 255; Cooper v. St. Paul R. Co., 54 Minn. 379; 56 N.

the act of getting on a moving train must have proximately contributed to the injury.²³

§ 521. **Getting on or off in other cases.**—Passengers must use ordinary care to protect themselves from injury, in entering or leaving cars and other vehicles, even when stationary, and also in entering or leaving any part of the carrier's premises.² Failure to use such care, if proximately contributing to

W. 42. In *Chicago etc., R. Co. v. Means* (48 Ill. App. 396), it was held that an infirm woman of seventy was negligent in thus starting to leave the train. But *query?* A train ran past a station, and then backed up to its usual place of stopping; held a question for the jury whether plaintiff was not justified in supposing she had reached her destination, and in attempting to leave the car (*Taber v. Delaware, etc. R. Co.*, 71 N. Y. 489). A passenger on a ferry-boat stepped up from the boat on to the bridge before the boat was completely fastened, and was injured by the bridge being suddenly lowered; she could recover (*Hawks v. Winans*, 42 N. Y. Superior, 451).

²³ Such act cannot be said to contribute to an injury caused by a sudden jerk of the train after the passenger had reached a position which would have been safe had there been no mismanagement (*Distler v. Long Island R. Co.*, 151 N. Y. 424; 45 N. E. 937; *rev'g* 78 Hun, 252; 28 N. Y. Supp. 865).

¹ In the following cases the plaintiff was held not to have been *necessarily* negligent: Plaintiff approached a street-car on its right-hand side, and attempted to board it by placing her right foot first on the platform, taking hold with her right hand of the rail around the guard on the rear of the platform, instead of taking hold of the rail placed on the body of the car (*Ganiard v. Rochester, etc.*,

R. Co., 50 Hun, 22; 2 N. Y. Supp. 470). The court cannot say, as matter of law, that an alighting passenger is bound to lay hold of hand-rails on the car (*Martin v. Second Ave. R. Co.*, 3 N. Y. App. Div. 448; 38 N. Y. Supp. 220). If, at the time a passenger stepped upon a railroad platform, he knew of its unsafe condition, he was not required to abandon its use, and if he used due care proportionate to the known danger, and was injured by reason of the defect, he would not be barred from recovery by such knowledge (*Pennsylvania Co. v. Marion*, 123 Ind. 415; 23 N. E. 973). It is not necessarily imprudent to rise from a seat and start for the exit, on approaching a station or other stopping place (*Baltimore, etc. R. Co. v. Myers*, 10 C. C. A. 485; 18 U. S. App. 569; 62 Fed. 367; *Snelling v. Brooklyn, etc. Ferry Co.*, 59 Hun, 619; 13 N. Y. Supp. 398 [ferry-boat]).

² *Bennett v. N. Y., New Haven, etc. R. Co.*, 57 Conn. 422; 18 Atl. 668 [leaving platform by stairs not lighted, where other flights were lighted]. A passenger on a ferry-boat, landing at night at a point where there was no light, walked with the crowd towards a gang-plank, having no guard or rail upon it, which she saw when she started, and while looking forward, instead of looking down at her feet, fell off the gang-plank. Held, guilty of contributory negligence, as matter of

a passenger's injury, is a bar to his action. But if the passenger's injury is not caused in part by his act in entering or leaving, it makes no difference how much in fault he may be in so doing; because his negligence does not contribute to his injury.³ It may be negligence to enter a vehicle obviously not ready for passengers, especially in the dark,⁴ but this does not at all imply that a passenger is in fault for merely entering before the time fixed for starting. On entering or leaving a street-car, stage-coach or other vehicle, likely to start at any moment, a passenger should use ordinary care to see that the carrier's agent has notice of his intention.⁵ Passengers by rail

law (*Fogassi v. N. Y. Cent. R. Co.*, 17 N. Y. App. Div. 286; 45 N. Y. Supp. 175). A passenger alighting at a station to which he is a stranger, and finding himself almost immediately left in utter darkness by the extinguishment of the station light, is not in fault for wandering out of the direct way (*Wallace v. Wilmington, etc. R. Co.*, 8 Del. 529; 18 Atl. 818). A railway company, for the more convenient access of passengers between the two platforms of a station, erected across the line a defective wooden bridge. Held, liable for the death of a passenger, through the faulty construction of this bridge, although there was a safer one, about one hundred yards further, which the deceased might have used (*Longmore v. Great Western R. Co.*, 19 C. B. N. S. 183). It is not an error to refuse to charge that where there are two ways of leaving a train, one safe and the other less safe, and a passenger, leaving by the latter way, is injured, he cannot recover, because, in selecting the more perilous way, "he was guilty of contributory negligence" (*Brodie v. Carolina Midland R. Co.*, 46 S. C. 203; 24 S. E. 180). s. p., *Cross v. Lake Shore, etc. R. Co.*, 69 Mich. 363; 37 N. W. 361; *Texas, etc. R. Co. v. McLane*, Tex. Civ. App.

; 32 S. W. 776. Compare *Gulf, etc. R. Co. v. Jordan* [Tex. Civ. App.], 33 S. W. 690.

³ *Weiler v. Manhattan R. Co.*, 53 Hun, 372; 6 N. Y. Supp. 320. Whether intoxication of passenger who fell from a car while attempting to alight, contributed to the injury is for the jury (*Newton v. Central Vt. R. Co.*, 80 Hun, 491; 30 N. Y. Supp. 488). The jury may take into consideration the "age, sex and physical condition" of the plaintiff in determining whether ordinary care was exercised in alighting from a train (*Hickman v. Missouri Pac. R. Co.*, 91 Mo. 433; 4 S. W. 127).

⁴ *Hodges v. New Hanover Tr. Co.*, 107 N. C. 576; 12 S. E. 597 [entering cars not lighted and prepared for reception of passengers].

⁵ Plaintiff, without indicating his intention to the conductor or driver, attempted to board street-car at the front platform. The driver was not looking to see if any one was to get on, and, starting up his horses, plaintiff was thrown to the ground and injured. *Nonsuit* (*Pitcher v. People's R. Co.*, 174 Pa. St. 402; 34 Atl. 567). This rule does not apply to ordinary railroad trains (*McDonald v. Long Isl. R. Co.*, 116 N. Y. 546; 22 N. E. 1068).

should enter and leave cars by such methods as are, to their knowledge, provided for that purpose, using ordinary care to avoid danger from passing trains⁶ or other vehicles, and to see obstacles in their path,⁷ especially if such obstacles are not interposed by any fault of the carrier. It is therefore generally, though not invariably,⁸ negligence for a passenger by rail to enter or leave on the opposite side from a landing platform,⁹ or, where there are two tracks, and cars are frequently running on both, to enter or leave by crossing the other track without some special reason.¹⁰ But if the proper side or method of

⁶ *Davenport v. Brooklyn R. Co.*, 100 N. Y. 632; 3 N. E. 305. Standing on a track where trains may be expected, is negligence (*Van Schaick v. Hudson Riv. R. Co.*, 43 N. Y. 527; see *Gonzales v. Harlem R. Co.*, 38 Id. 440; *Mills v. N. Y. Cent. R. Co.*, 5 N. Y. App. Div. 11; 39 N. Y. Supp. 280). But passengers have a right to act upon the assumption that due care will be taken to keep trains off tracks which they must cross on leaving (*Brassel v. N. N. Cent. R. Co.*, 84 N. Y. 241).

⁷ *Moylan v. Second Ave. R. Co.*, 128 N. Y. 583; 27 N. E. 977 [truck standing in the way].

⁸ *Chicago, etc. R. Co. v. Lowell*, 151 U. S. 209; 14 S. Ct. 281; and see note 10, *infra*.

⁹ *Louisville, etc. R. Co. v. Ricketts*, 93 Ky. 116; 19 S. W. 182 [night]; *Hughlett v. Louisville, etc. R. Co.* [Ky.], 22 S. W. 551; *Pastoris v. Baltimore, etc. R. Co.* [Pa.], 24 Atl. 283 [midnight: passenger intoxicated fell off bridge]; *Wardlaw v. California R. Co.*, Cal. ; 42 Pac. 1075 [passenger climbing between cars from side opposite platform].

¹⁰ Such conduct was held negligence, as matter of law, under the circumstances, in *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352; 20 Atl. 994 [steam-road]; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318 [same]; *Goldberg v. N. Y. Central R. Co.*,

133 N. Y. 561; 30 N. E. 597 [same]. Where the company has provided a way from the platform to the streets without crossing the railroad, a passenger who, crossing the road, is struck by an engine, cannot recover (*Bancroft v. Boston, etc. R. Co.*, 97 Mass. 275). So held, also, where a passenger needlessly left the platform to take a short road across the track, and (it being dark) fell into a cattle-guard (*Forsyth v. Boston, etc. R. Co.*, 103 Mass. 510). Where it was usual for passengers to alight on the south side (though the station was on the north side), because that side was nearest to the village, held to be error to charge, as matter of law, that the attempt to alight on the south side did not constitute contributory negligence—that it was a question for the jury (*Plopper v. N. Y. Central R. Co.*, 13 Hun, 625). But where such crossing was not obviously dangerous, was customary, and not objected to, though contrary to rule, held, a question for the jury (*Chicago, etc. R. Co. v. Lowell*, 151 U. S. 209; 14 S. Ct. 281. s. p., *McDonald v. Kansas City, etc. R. Co.*, 127 Mo. 38; 29 S. W. 848). It is not *per se* negligence for a passenger on a double-track horse railroad to alight from the car on the side near the other track (*Chicago, etc. R. Co. v. Bolton*, 37 Ill. App. 143).

entry is not obvious, and the passenger is not proved to have had sufficient notice otherwise, he cannot be held in fault for selecting any method which is consistent with ordinary care.¹¹ The mere fact that one mode of entry is the most usual and convenient, as a general rule, does not make it negligence for a passenger to adopt a different mode, when more convenient.¹² The fact that proper facilities for entry or exit are not provided by the carrier, does not justify a passenger in adopting another method which is also dangerous.¹³ Where, as in the case of steam railroads, regular stopping places are provided by the carrier, at which alone passengers are expected to get on and off the train, and where platforms or other conveniences for the safety of passengers are provided, it is some evidence of negligence, if a passenger enters or leaves the train at another place, without the carrier's assent.¹⁴ If, by thus entering or leaving at a point not provided for, a passenger sustains an injury, which would not otherwise have happened, the pre-

¹¹ *McKimble v. Boston, etc. R. Co.*, 141 Mass. 463; 5 N. E. 804.

¹² Though it is usual for travelers in horse-cars to enter and leave by the rear platform, and to ask the conductor, rather than the driver, to stop the car, yet a passenger is not chargeable with negligence, as matter of law, for adopting the opposite course when more convenient (*Holmes v. Allegheny Tr. Co.*, 153 Pa. St. 152; 25 Atl. 640). In *Mulhado v. Brooklyn R. Co.* (30 N. Y. 370), held there was no fault in plaintiff's attempting to get off the front platform instead of the rear one, he having got on at the front without objection, and it not appearing that any notice was given to passengers that they must not get off the front platform. The facts that plaintiff, when about to take passage upon a street-car, approached the same while it was moving slowly, the horses being on a walk, attempted to enter by the rear platform, which, however, he found full, and passed along the side of the

car to reach the front platform, walking upon a ridge of snow thrown up by the company, upon which he slipped and fell under the wheels of the car, held not contributory negligence, as matter of law (*Dixon v. Brooklyn, etc. R. Co.*, 100 N. Y. 170; 3 N. E. 65). *s. p.*, *Platt v. Forty-second St., etc. R. Co.*, 4 Thomp. & C. 406; *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa. St. 70; 12 Atl. 821. Where the regulations forbid the use of the front platform, and the passenger has notice of this, the case is different (*Baltimore, etc. R. Co. v. Wilkinson*, 30 Md. 224).

¹³ *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *Deery v. Camden, etc. R. Co.*, 163 Pa. St. 403; 30 Atl. 162 [use of side-door, against rules].

¹⁴ *Davis v. Chicago, etc. R. Co.*, 18 Wisc. 175 [train had stopped sufficient time for plaintiff to have left it upon the platform]; *Evansville, etc. R. Co. v. Duncan*, 28 Ind. 441 [plaintiff warned]; *Siner v. Great Western R. Co.*, L. R. 3 Ex. 150; 4 Id. 117.

sumption of contributory negligence is very strong.¹⁵ But the mere act of entering or leaving a stationary train, at some place other than the regular platform, is not negligence *per se*. It may be justified by the circumstances.¹⁶ The bringing of the train to a stop near the station, after having given the usual signal indicating the arrival at the station, is an implied invitation to alight; and alighting under the circumstances is not contributory negligence.¹⁷ As in other cases, directions from

¹⁵ Nonsuit ordered in the following cases: Louisville, etc. R. Co. v. Ricketts, 96 Ky. 44; 27 S. W. 860 [dark side of track]; Ohio, etc. R. Co. v. Schiebe, 44 Ill. 460 [train suddenly starting]; Chicago, etc. R. Co. v. Hague, 48 Neb. 97; 66 N. W. 1000 [knowingly alighting on high trestle]; Nagle v. California So. R. Co., 88 Cal. 86; 25 Pac. 1106 [alighting on trestle without looking] Smith v. Georgia Pac. R. Co., 88 Ala. 538; 7 So. 119 [obviously improper place]; Dewald v. Kansas City, etc. R. Co., 44 Kans. 586; 24 Pac. 1101 [leaving train on a side track without looking]; Reed v. Covington, etc. Bridge Co. [Ky.], 28 S. W. 149 [premature attempt to land from vessel]. A passenger takes the risk of getting on car at a place he knew to be dangerous, especially when warned by carrier's servants not to make the attempt until the place is passed (Citizens' R. Co. v. Twiname, 111 Ind. 587; 13 N. E. 55).

¹⁶ Keating v. N. Y. Central R. Co., 3 Lans. 469; East Tennessee, etc. R. Co. v. Conner, 15 Lea, 254; Stoner v. Pennsylvania Co., 98 Ind. 384 [getting on train south of station]; Cartwright v. Chicago, etc. R. Co., 52 Mich. 606; 18 N. W. 380 [leaving car not brought or intended to be brought up to platform, justifiable]; Galveston, etc. R. Co. v. Cooper, 70 Tex. 67; 8 S. W. 68 [entering at water-tank]; International, etc. R. Co. v. Eckford, 71 Tex. 274; 8 S. W.

679 [personal injuries caused by falling through a trestle while alighting from train in the dark, without directions to do so by company's servants, and with knowledge of locality of station; question for jury]. Plaintiff fell at night into a space between the car, from which she was alighting, and the station platform; she tried to ascertain where she was stepping but was prevented by the absence of light; held, question of contributory negligence was for jury (Fox v. New York, 5 N. Y. App. Div. 349; 39 N. Y. Supp. 309). In Cockle v. South Eastern R. Co. (L. R. 5 C. P. 457; aff'd, 7 C. P. 321), plaintiff got off when the train stopped, supposing that she was stepping on the platform, but fell short of it, the place being dark. Judgment in her favor was affirmed.

¹⁷ Philadelphia, etc. R. Co. v. Anderson, 72 Md. 519; 20 Atl. 2; Southern Kans. R. Co. v. Pavey, 48 Kans. 452; 29 Pac. 593; Richmond, etc. R. Co. v. Smith, 92 Ala. 237; 9 So. 223 [passenger not in fault, though alighting on trestle in the dark]; Terre Haute, etc. R. Co. v. Buck, 96 Ind. 346. It is said, in Illinois Central R. Co. v. Able (59 Ill. 131), that a passenger is usually justified in construing a momentary halt of the train at his station into an invitation to alight. See Gadsden, etc. R. Co. v. Causler, 97 Ala. 235; 12 So. 439; Wood v. Lake Shore, etc. R. Co., 49 Mich. 370.

the carrier's agents to enter or leave in any particular manner justify passengers in obeying, unless the danger is obvious.¹⁸

§ 522. **Statutes as to platforms, etc.** — It is generally provided by statute that a railroad company shall not be liable for accidents happening to passengers while on a baggage-car or a platform, provided seats are furnished for all passengers on the train, and a notice of the rule is conspicuously posted up in each car.¹ The requirements of these statutes must be strictly complied with, in order to enable a railroad company to avail itself of their protection. If the requisite notices are not properly posted,² or if there are no vacant seats in the car,³ a passenger's rights are unaffected by the statute. Where the statute requires the notice to be posted *inside* the car, a notice posted on the *outside* has no effect, unless it is proved to have come to the actual notice of the passenger against whom it is to be enforced.⁴ The fact that the passenger is aware of the terms of the statute is immaterial, for it confers no privilege upon railroads except upon the conditions mentioned; and the non-performance of those conditions is sufficient evidence that the statute does not apply. And although there are seats actually unoccupied by passengers, yet if they are filled up with bags or other things, or are improperly covered by passengers with their clothes, a passenger is at liberty to retire to the platform, so far as the statute is concerned. It is the duty of the conductor to provide seats without being asked to do

¹⁸ *Maier v. Central Park, etc. R. Co.*, 67 N. Y. 52 [boy entering in front of car]; *De Rozas v. Metropolitan R. Co.*, 13 N. Y. App. Div. 296; 43 N. Y. Supp. 27; *Baltimore, etc. R. Co. v. Kane*, 69 Md. 11; 13 Atl. 387 [woman entering elsewhere than at station]; *Foss v. Boston, etc. R. Co.*, 66 N. H. 256; 21 Atl. 222 [feeble person assisted by carrier's servants]; *Hinshaw v. Raleigh, etc. R. Co.*, 118 N. C. 1047; 24 S. E. 426 [conductor directed the passengers to get out]; *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168; 11 S. W. 559 [conductor told plaintiff to be quick and get off].

¹ N. Y. Stat. of 1850, ch. 140, § 40; Railroad Law, 1892, ch. 676, § 53; *Indiana R. S.*, § 3928; *Missouri R. S.* 1879, § 800.

² *Carroll v. New Haven R. Co.*, 1 Duer, 571, 579. S. P., *Nolan v. Brooklyn, etc. R. Co.*, 87 N. Y. 63. See *Weymouth v. Broadway, etc. R. Co.*, 2 N. Y. Misc. 506; 22 N. Y. Supp. 1047 [notice must be visible when seats are filled]; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135; *Willis v. Long Island R. Co.*, 34 Id. 670.

³ *Morris v. Eighth Ave. R. Co.*, 68 Hun, 39; 22 N. Y. Supp. 666.

⁴ *Clark v. Eighth Ave. R. Co.*, 32 Barb. 657; *aff'd*, 36 N. Y. 135.

so,⁵ and a passenger is not bound to claim a seat which is in any way occupied. When the provisions of the statute have been complied with, a railroad company does not waive the benefit of the statute by taking the fare of a passenger standing upon a prohibited place.⁶ If the passenger's violation of the statute does not proximately contribute to his injury, it is no defense.⁷ The statute does not apply to a passenger going upon the platform, for the purpose of alighting, when it is otherwise proper for him to do so.⁸ The New York statute does not apply to street railroads.⁹

§ 523. **Passengers in improper place.** — Apart from statutes, a railroad company has no right to accuse a passenger of negligence in taking a seat in any car apparently designed for passengers, unless the conductor requests him to take another car.¹ Passengers are not bound to select one car, or place in a

⁵ *Willis v. Long Island R. Co.*, 32 Barb. 398 ; *aff'd*, 34 N. Y. 670.

⁶ *Higgins v. Harlem R. Co.*, 2 Bosw. 132. See also *Houston, etc. R. Co. v. Moore*, 49 Tex. 31. Under the Mississippi statute, which provides that a company shall not be liable for an injury to a passenger while on a freight train, unless caused by its gross negligence, it is held that a freight train does not become a passenger train by the fact of passengers being permitted to ride in the conductor's caboose (*Perkins v. Chicago, etc. R. Co.*, 60 Miss. 726). See § 513a, *ante*.

⁷ *Omaha, etc. R. Co. v. Chollette*, 41 Neb. 578 ; 59 N. W. 921 ; *Watson v. Northern R. Co.*, 24 Upp. Can. [Q. B.] 98.

⁸ *Baltimore, etc. R. Co. v. Meyers*, 62 Fed. 367 ; 10 C. C. A. 485 ; 18 U. S. App. 569 ; *Central R. Co. v. Miles*, 88 Ala. 256 ; 6 So. 696 ; *Schultze v. Missouri Pac. R. Co.*, 32 Mo. App. 438.

⁹ It applies only to steam railroads, and has no application to street railroads using horse power (*Vail v.*

Broadway R. Co., 147 N. Y. 377 ; 42 N. E. 4) or electric power (*Wood v. Brooklyn R. Co.*, 5 N. Y. App. Div. 492 ; 38 N. Y. Supp. 1077).

¹ Plaintiff was riding in the post-office department of the baggage-car, without any objection from any agent of the company, when a collision occurred. Held, that the fact of his being in the baggage-car, when in case of a collision the other cars would have been safer, would not constitute contributory negligence (*Carroll v. New Haven R. Co.*, 1 Duer, 571). *s. p.*, *Webster v. Rome, etc. R. Co.*, 115 N. Y. 112 ; *aff'g* 40 Hun, 161. Where the rules of a company forbade passengers to ride in the baggage-car, but a laborer had for two months daily sat in that car, being too dirty from his work to make his presence in the other cars agreeable, and the conductor had made no objection ; held, that the laborer could recover for an injury (*O'Donnell v. Allegheny Valley R. Co.*, 39 Pa. St. 239). It is obvious that non-compliance with a request to change cars should not constitute

car, in preference to another, upon the ground that one would be safer than the other in case of a collision or other accident,² so long as both places appear to be designed for the use of passengers while traveling. It is presumptively not proper for a passenger to ride on a hand-car,³ or a strict freight-car,⁴ or on top of a car,⁵ on a locomotive or tender;⁶ or on any car which he knows is not to be used for passengers.⁷ But circumstances may and often do exist, which justify doing any of these things.⁸ Riding in a better and safer car than the passenger

negligence on the part of a passenger who does not understand it (*Walter v. Chicago, etc. R. Co.*, 39 Iowa, 33).

² *Carroll v. New Haven R. Co.*, 1 Duer, 571, 579; *Willis v. Long Island R. Co.*, 32 Barb. 398; *aff'd*, 34 N. Y. 670. It was defendant's custom to direct passengers to enter certain cars at starting, but no notice was posted up of such direction, and plaintiff stepped into another car where he could not get a seat, and was injured by the collision of that car with another. Held, not contributory negligence (*Pollard v. New Haven R. Co.*, 7 Bosw. 437).

³ A hand-car is obviously not intended for passengers, and a person riding on one, though by invitation of the foreman, cannot recover (*Hoar v. Maine Central R. Co.*, 70 Me. 65). *s. p.*, *Houston, etc. R. Co. v. Bolling*, 59 Ark. 395; 27 S. W. 492. See also, *McCahill v. Detroit, R. Co.*, 96 Mich. 156; 55 N. W. 668; *Catlett v. St. Louis, etc. R. Co.*, 57 Ark. 461; 24 S. W. 1062; *Illinois Cent. R. Co. v. Meacham*, 91 Tenn. 428; 19 S. W. 232; *Gulf, C., etc. R. Co. v. Dawkins*, 77 Tex. 228; 13 S. W. 982; *International, etc. R. Co. v. Prince*, 77 Tex. 560; 14 S. W. 171.

⁴ Deceased, who were killed in a train leaving the track, were not guilty of contributory negligence by reason of sitting on a flat car, though the conductor had told them he would

rather they would go into a box car, as it was safer, and better there (*Berry v. Missouri Pac. R. Co.*, 124 Mo. 223; 25 S. W. 229).

⁵ *Little Rock, etc. R. Co. v. Miles*, 40 Ark. 298; *New Orleans, etc. R. Co. v. Thomas*, 9 C. C. A. 29; 60 Fed. 379 [question for jury]. See *St. Louis Southwestern R. Co. v. Rice*, 9 Tex. Civ. App. 509; 29 S. W. 525 [passenger injured by an overhanging water spout while riding on top of a caboose].

⁶ *Rucker v. Mo. Pacific R. Co.*, 61 Tex. 499 [front of engine]; *Robertson v. Erie R. Co.*, 22 Barb. 91 [engine]; *Doggett v. Ill. Central R. Co.*, 34 Iowa, 284 [tender]. But this does not apply to the "dummy" of a cable train (*Hawkins v. Front St. Cable R. Co.*, 3 Wash. St. 592; 28 Pac. 1021). In special cases, riding on the engine may be justified (*Lake Shore, etc. R. Co. v. Brown*, 123 Ill. 162; 14 N. E. 197 [on footboard by invitation]).

⁷ Where a passenger enters a gravel train, from which the rules of the company excluded all passengers. Held, if notified of the rule, he could not recover for an injury suffered while on the train (*Lawrenceburgh, etc. R. Co. v. Montgomery*, 7 Ind. 474).

⁸ So held as to caboose car in freight train (*Edgerton v. Harlem R. Co.*, 35 Barb. 193; *aff'd*, 39 N. Y. 227; *Creed v. Pennsylvania R. Co.*,

is entitled to, without objection, cannot be contributory negligence.⁹ Standing inside a vehicle of any kind, when all seats are occupied, does not of itself raise even a presumption of negligence, in the United States,¹⁰ whatever might be the case in countries where such matters are more strictly regulated; since there is probably no person who is or ever was so prudent as to refuse to do so. Standing upon the seat of a car in motion is presumptively negligence, which needs special justification;¹¹ and it is usually deemed negligent to stand for any considerable length of time and without good reason, in any position which the usual jar of traveling renders dangerous.¹² It is not, at common law, necessarily negligent for a passenger to stand upon the platform of a car in motion,¹³

86 Pa. St. 139; Delaware, etc. R. Co. v. Ashley, 14 C. C. A. 368; 67 Fed. 209). So as to stock-cars (Lawson v. Chicago, etc. R. Co., 64 Wisc. 447 [passenger rode in stock-car with his horses]; Florida R., etc. Co. v. Webster, 25 Fla. 394; 5 So. 714 [same]; Chicago, etc. R. Co. v. Dickson, 143 Ill. 368; 32 N. E. 380 [same; though contrary to general rule]).

⁹ Dunn v. Grand Trunk R. Co., 58 Me. 187. See Fowler v. Baltimore, etc. R. Co., 18 W. Va. 579; St. Louis, etc. R. Co. v. Cantrell, 37 Ark. 519; Lambeth v. North Carolina R. Co., 66 N. C. 499; Hickey v. Boston, etc. R. Co., 14 Allen, 429; Downey v. Hendrie, 46 Mich. 498; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21; Houston, etc. R. Co. v. Clemmons, 55 Tex. 89; Lindsey v. Chicago, etc. R. Co., 64 Iowa, 407.

¹⁰ Griffith v. Utica, etc. R. Co., 63 Hun, 626; 17 N. Y. Supp. 692 [crowded street-car]. Any duty to stand is sufficient justification, in any train (Truex v. Erie R. Co., 4 Lans. 198).

¹¹ Where a passenger, without asking assistance, stood on the seat in order to reach bundles, and was thrown to the floor by the moving of

the car, she could not recover (East Tennessee, etc. R. Co. v. Green, 95 Ga. 736; 22 S. E. 658).

¹² See cases cited in next note.

¹³ The mere fact that a passenger stands upon the platform of a moving car in a steam train is not *conclusive* evidence of negligence (Willis v. Long Island R. Co., 34 N. Y. 670; Werle v. Same, 98 N. Y. 650; Bonner v. Glenn, 79 Tex. 531; 15 S. W. 572; Mitchell v. Southern Pac. R. Co., 87 Cal. 62; 25 Pac. 245). Much less is it considered so, as to horse-cars (Nolan v. Brooklyn, etc. R. Co., 87 N. Y. 63 [plaintiff smoking]; Leh. v. Steinway, etc. R. Co., 118 N. Y. 556; 23 N. E. 889 [car crowded]; Hastings v. Central Crosstown R. Co., 7 N. Y. App. Div. 312; 40 N. Y. Supp. 93 [platform]; Pendergast v. Union R. Co., 10 N. Y. App. Div. 207; 41 N. Y. Supp. 927 [no seats; platform]; Thirteenth, etc. R. Co. v. Boudrou, 92 Pa. St. 475 [crowded car; platform]; Highland Ave., etc. R. Co. v. Donovan, 94 Ala. 299; 10 So. 139 [same]; Olivier v. Louisville, etc. R. Co., 43 La. Ann. 804; 9 So. 431 [same]; Archer v. Ft. Wayne, etc. R. Co., 87 Mich. 101; 49 N. W. 488 [same]; Brusch v. St. Paul R.

unless the circumstances are such as to make it absolutely inconsistent with ordinary prudence to do so.¹⁴ It is presumptively negligent for a passenger to do so, if forbidden by a rule of which he was or ought to have been aware.¹⁵ Even a known rule against riding on platforms does not make it necessarily negligent to do so. If the rule is habitually suffered by the carrier to be disregarded, this presumption ceases.¹⁶ If one

Co., 52 Minn. 512; 55 N. W. 57 [same]; *Beal v. Lowell*, etc. R. Co., 157 Mass. 444; 32 N. E. 653; *Meesel v. Lynn*, etc. R. Co., 8 Allen, 234). On the other hand, it is reversible error to charge, as matter of law, that it was not negligence to ride on the steps or platform of the car, since that is a question of fact (*Illinois Cent. R. Co. v. O'Keefe*, 154 Ill. 508; 39 N. E. 606). A passenger on street-car, after signaling conductor to stop car, left his seat and stood for a moment while car was in motion, on rear platform, upon which was an accumulation of snow and ice, rendering it slippery. Expecting the car would stop, he omitted to take hold of the rail, the car jolted, and he was thrown off. Held, question of his negligence should have been submitted to jury (*Fleck v. Union R. Co.*, 134 Mass. 480). The question must be distinctly left to the jury (*Willmott v. Corrigan R. Co.*, 106 Mo. 535; 17 S. W. 490; 16 S. W. 500).

¹⁴ It has been held negligence, as matter of law, to ride upon a car platform in a train going thirty miles an hour over a succession of sharp curves; and the fact that no seats were to be had, and that the cars were crowded with standing passengers was not sufficient excuse for doing so (*Worthington v. Central Vt. R. Co.*, 64 Vt. 107; 23 Atl. 590; *Goodwin v. Boston*, etc. R., 84 Me. 203; 24 Atl. 816). *S. P., Gavett v. Manchester*, etc. R. Co., 16 Gray, 501;

Camden, etc. R. Co. v. *Hoosey*, 99 Pa. St. 492; *Scheiber v. Chicago*, etc. R. Co., 61 Minn. 499; 63 N. W. 1034). The platform of a car is not to be deemed a place of danger when the train is at rest (*Walter v. Chicago*, etc. R. Co., 39 Iowa, 33).

¹⁵ In the following cases, the passengers knew of the rule, and could not recover: *Malcom v. Richmond*, etc. R. Co., 106 N. C. 63; 11 S. E. 187 [not holding on]; *Baltimore*, etc. R. Co. v. *Wilkinson*, 30 Md. 224 [driver invited passenger no excuse]; *McAunich v. Mississippi*, etc. R. Co., 20 Iowa, 338; *McCauley v. Tennessee Coal*, etc. Co., 93 Ala. 356; 9 So. 611; *Alabama*, etc. R. Co. v. *Hawk*, 72 Ala. 116; *Torrey v. Boston*, etc. R. Co., 147 Mass. 412; 18 N. E. 213. Much less can he excuse his negligence, if he is expressly requested by the carrier to quit the platform, although there are no seats inside the car, if there is room for him to enter (*Graville v. Manhattan R. Co.*, 105 N. Y. 525; 12 N. E. 51; *Louisville*, etc. R. Co. v. *Bisch*, 120 Ind. 549; 23 N. E. 662). In *Baltimore*, etc. Road v. *Cason* (72 Md. 377; 20 Atl. 113), held, that the passengers *ought* to have known the rule.

¹⁶ The fact that a railroad company has a rule prohibiting passengers being in its baggage-cars does not absolve it from the duty of care toward passengers who are in a baggage-car, if it habitually disregards the rule, and permits passengers to ride in such cars (*Jones v.*

rule prohibits the use of the platform, while another directs it to be used under certain conditions (*e. g.*, for smoking) the latter rule modifies the former.¹⁷ In the absence of evidence showing such danger in doing so, as would make the act inconsistent with ordinary prudence, a jury may hold a passenger justified in taking to the platform if he could not get a seat inside,¹⁸ or if he could not stand inside without great discomfort to himself or the other occupants;¹⁹ and so probably, if any nuisance were allowed inside the car, such, for example, as drunkenness, obscenity, quarreling, or even smoking, if it were offensive to him, and he could not find a place in any other car, free from these objections. The objection to the use of ordinary platforms by passengers have very limited application to vestibuled trains; since these obviously invite passengers to walk from car to car while in motion, although not, perhaps, to use the platforms for standing. No presumption of negligence arises from the use of platforms on horse-cars or electric street-cars, even though there are seats to be had inside, so long as such use is not forbidden by a rule kept in active operation.²⁰ The question is entirely one of fact, having regard to all the circumstances. In such cases, the danger of cars crushing together is almost entirely absent; while the moderate speed

Chicago, etc. R. Co., 43 Minn. 279; 45 N. W. 444).

¹⁷ A rule of a street-railroad that "smoking on closed cars is prohibited, except on the front platform," modifies a notice, prohibiting passengers from standing on platforms, and operates as a waiver of immunity from liability to one while smoking on such platform conferred by General Railroad Acts, § 46 (*Vail v. Broadway R. Co.*, 147 N. Y. 377; 42 N. E. 4).

¹⁸ The fact that a passenger failing to find a seat in a steam railroad car, takes a position on the platform where other passengers are riding, without objection from any employee, and is thrown from the car by a sudden jerk, does not, as matter of law, establish contributory negli-

gence (*Werle v. Long Island R. Co.*, 98 N. Y. 650). To same effect, *Dewire v. Boston, etc. R. Co.*, 148 Mass. 343; 19 N. E. 523; *East Omaha R. Co. v. Godola*, Neb. ; 70 N. W. 491; *Merwin v. Manhattan R. Co.*, 48 Hun, 608; 1 N. Y. Supp. 267. Otherwise, if there were unoccupied seats inside (*Bradley v. Second Ave. R. Co.*, 90 Hun, 419; 35 N. Y. Supp. 918).

¹⁹ *Ginna v. Second Ave. R. Co.*, 67 N. Y. 596 [horse-car]; *Augusta, etc. R. Co. v. Renz*, 55 Ga. 126.

²⁰ *Upham v. Detroit City R. Co.*, 85 Mich. 12; 48 N. W. 199; *Sutherland v. Standard Life Ins. Co.*, 87 Iowa, 505; 54 N. W. 453; *Matz v. St. Paul City R. Co.*, 52 Minn. 159; 53 N. W. 1071.

lessens the danger of being thrown off. It is contributory negligence to sit or stand in any dangerous place obviously not intended for the use of passengers on the journey, if, by doing so, the injury is in part brought about,²¹ and it is no excuse that the conductor did not order the passenger to change.²² Remaining long upon the steps of a car in motion usually raises a presumption of negligence,²³ but it is not inexcusable negligence;²⁴ for if a street-car is so crowded that no better place can conveniently be found, standing on a step is usually permissible,²⁵ especially if it is an open car, with long steps,

²¹ Carroll v. Interstate Tr. Co., 107 Mo. 653; 17 S. W. 889 [covered steps of elevated train]; Bard v. Pennsylvania Tr. Co., 176 Pa. St. 97; 34 Atl. 952 [riding on bumper of car]; Jackson v. Crilly, 16 Colo. 103; 26 Pac. 331 [sitting on railing on rear end of open car]. For passenger on ferry-boat to stand near bow while boat is landing, not necessarily negligence (Peverly v. Boston, 136 Mass. 366). s. p., Miller v. Ocean Steamship Co., 118 N. Y. 199; 23 N. E. 462.

²² Ky. Central R. Co. v. Thomas, 79 Ky. 160; Baltimore, etc. R. Co. v. State, 72 Md. 36; 18 Atl. 1107 [riding in postal car]; Florida So. R. Co. v. Hirst, 30 Fla. 1; 11 So. 506 [riding in express car]; Atchison, etc. R. Co. v. Johnson, 3 Okl. 41; 41 Pac. 641 [riding in box car, instead of caboose, on freight train].

²³ McDonald v. Montgomery R., 110 Ala. 161; 20 So. 317; Coleman v. Second Ave. R. Co., 114 N. Y. 609; 21 N. E. 1064; Francisco v. Troy, etc. R. Co., 78 Hun, 13; 29 N. Y. Supp. 247. So held, where he stood on the steps of the platform, there being room inside (Quinn v. Illinois Central R. Co., 51 Ill. 495; Ward v. Central Park R. Co., 11 Abb. N. S. 411; Fisher v. West Virginia, etc. R. Co., 43 W. Va. 183; 24 S. E. 570 [passenger intoxicated; room inside].

²⁴ Pray v. Omaha R. Co., 44 Neb. 167; 62 N. W. 447 [street-car]. It is not negligence *per se* for a passenger on a street-car to stand on the step of the car, outside of a gate placed between the step and the platform, at the express or implied invitation of the driver; the danger not being so obvious that it can be said that a reasonable man would disobey the invitation (Seymour v. Citizens' R. Co., 114 Mo. 266; 21 S. W. 739). The question of the negligence of a passenger on an electric street-car in leaving his seat and stepping on the footboard, while the car was still in motion, was one of fact for the jury (Denver Tramway Co. v. Reid, 22 Colo. 349; 45 Pac. 378). s. p., Linch v. Pittsburgh Tr. Co., 153 Pa. St. 102; 25 Atl. 621 [alighting from step].

²⁵ This was held a question for the jury in Wilde v. Lynn, etc. R. Co., 163 Mass. 533; 40 N. E. 851; Lehr v. Steinway, etc. R. Co., 118 N. Y. 556; 23 N. E. 889; Wood v. Brooklyn R. Co., 5 N. Y. App. Div. 492; 38 N. Y. Supp. 1077; Pray v. Omaha R. Co., 44 Neb. 167; 62 N. W. 447; Topeka R. Co. v. Higgs, 38 Kans. 375; 16 Pac. 667. But a person who stands on the lower steps of a street-car must be careful not to lean beyond the range of the car (Cummings v. Worcester, etc. R., 166 Mass. 220; 44 N. E. 126).

commonly used by standing passengers.²⁶ The question is generally for the jury. The same rules were long ago applied to stage-sleighs, having similar long steps.²⁷ One standing upon a platform must use such care as that position requires;²⁸ but it is not necessarily negligent for him to omit to hold on to the car with his hands. That is for the jury to decide.²⁹ By riding in a car where he has no right to be at all, a passenger assumes risks peculiar to the nature and position of the car. But by riding in a prohibited part of a car (the other part being proper for use) the only risks assumed are such as belong to the construction of that part of the car.³⁰ Directions from the carrier's agent, having apparent authority, will justify a passenger in riding upon any platform or step, or any kind of car, or even a locomotive,³¹ provided a prudent person would have done so.³² A passenger does not lose any of his rights to care and protection by taking a dangerous place.³³ He assumes no risks except such as naturally ensue from that position. The fact that a passenger was in a place exposed to special danger is of

²⁶ *Cogswell v. West St. R. Co.*, 5 Wash. St. 46; 31 Pac. 411. Where it is customary in a busy season to allow passengers on street-cars to ride on the side steps of an open car, there being no seats vacant, in the absence of any warning or objection from the conductor, a passenger so riding is not guilty of contributory negligence (*Topeka City R. Co. v. Higgs*, 38 Kans. 375; 16 Pac. 667; *City R. Co. v. Lee*, 50 N. J. Law, 435; 14 Atl. 883; *Herdt v. Rochester, etc. R. Co.*, 65 Hun, 625; 20 N. Y. Supp. 346; *Gray v. Rochester, etc. R. Co.*, 61 Hun, 212; 15 N. Y. Supp. 927; 19 Id. 910.)

²⁷ There was no room inside of a sleigh for plaintiff, so he stood on steps at the side and was injured by another sleigh running into it. Held, not negligence *per se* to stand on the steps, but a question for the jury (*Spooner v. Brooklyn R. Co.*, 54

N. Y. 230, overruling s. c., 31 Barb. 419.)

²⁸ *Mann v. Philadelphia Tr. Co.*, 175 Pa. St. 122; 34 Atl. 572 [sitting on high stool]; *Butler v. Pittsburgh, etc. R. Co.*, 139 Pa. St. 195; 21 Atl. 500 [knees projecting].

²⁹ *Matz v. St. Paul R. Co.*, 52 Minn. 159; 53 N. W. 1071.

³⁰ N. Y., *Lake Erie, etc. R. Co. v. Ball*, 53 N. J. Law, 283; 21 Atl. 1052.

³¹ *Lake Shore, etc. R. Co. v. Brown*, 123 Ill. 162; 14 N. E. 197.

³² *Id.*

³³ *Willmott v. Corrigan R. Co.*, 106 Mo. 535; 17 S. W. 490. But otherwise, where a person, not an employee, rides, with the acquiescence of the superintendent, on a car which he knows is for the use of employees only, and not for passengers (*McCauley v. Tennessee Coal, etc. Co.*, 93 Ala. 356; 9 So. 611).

no importance, if he would have been equally injured had he remained in a proper place.³⁴

§ 524. Changing places on train.—There is no rule of law forbidding passengers on a train to change their seats or to move from one car to another, so long as they act prudently in doing so. Therefore the mere fact that an injury would not have been suffered, had the passenger remained in the seat or car which he first took, is not proof of contributory negligence. Even while a train is in motion such a change may be made, if consistent with the ordinary prudence of prudent men. In trains of old patterns, where the platforms are in their nature unsafe for crossing, a passenger who, without good reason, crosses platform while the train is moving rapidly, may fairly be held to take that risk, but the risk ends with his safe entry into a passenger car. The modern vestibule train, by its very construction, invites passengers to cross platforms, while the train is in motion; and no presumption of negligence arises from so doing. Passengers have a right to presume that all passenger cars are equally safe; and they ought not to be restricted to any one. Nor can they be required to sit still. The law, which makes liberal allowance for the natural restlessness of dogs,¹ must surely make equal allowance for the restlessness of the average man. Long train journeys are monotonous and trying, at their best; and active men find it impossible to sit still all the way. No special reason for moving need be assigned. The only question is, whether, under all the circumstances, the act was one natural to a prudent man, exercising his prudence. Slight reasons, such as a desire to smoke² or to drink,³ or because the car was not properly heated,⁴ have been held quite sufficient. There are extra-judicial intimations to the con-

³⁴ Webster v. Rome, etc. R. Co., 115 N. Y. 112; 21 N. E. 725; aff'd 40 Hun, 161 [baggage-car]; Jones v. Chicago, etc. R. Co., 43 Minn. 279; 45 N. W. 444 [same]; Kansas, etc. R. Co. v. White, 67 Fed. 481; 14 C. C. A. 483 [platform]. s. p., Lawrenceburgh etc. R. Co. v. Montgomery, 7 Ind. 474; Keith v. Pinkham, 43 Me. 501; Caldwell v. Murphy, 1 Duer, 233; Pennsylvania R. Co. v. Lang-

don, 92 Pa. St. 21; Railroad Co. v. Jones, 95 U. S. 439.

¹ See Read v. Edwards, 17 C. B. [N. S.], 245.

² Costikyan v. Rome, etc. R. Co., 58 Hun, 590; 12 N. Y. Supp. 683; aff'd 128 N. Y. 633.

³ Cotchett v. Savannah, etc. R. Co., 84 Ga. 687; 11 S. E. 553.

⁴ Sickles v. Missouri, etc. R. Co., Tex. Civ. App. ; 35 S. W. 493.

trary;⁵ but the real decision in each case was that the change was one which necessarily involved perils which a prudent man would not have taken, such as climbing over rails,⁶ going on the engine⁷ or a baggage-car⁸ or crossing dangerous platforms.⁹ It is certain that the inability of a passenger to obtain a seat in the car which he first enters is sufficient reason for his leaving it for another.¹⁰ And when a passenger, without fault, finds himself upon a wrong car, he is quite justified in crossing to the right one.¹¹ Much more is he justified in making a change, and crossing any platform, in obedience to a direction or request of the officer in charge of the train or car,¹² since

⁵ See *Peoria, etc. R. Co. v. Lane*, 83 Ill. 448; *Galena, etc. R. Co. v. Fay*, 16 Id. 558, 562, 570.

⁶ *McDaniel v. Highland Ave. R. Co.*, 90 Ala. 64; 8 So. 41.

⁷ *Ib.*

⁸ Where a passenger went into the baggage-car to get water, none being provided elsewhere for the passengers, and had been there three minutes when the accident occurred: *Held*, contributory negligence (*Houston, etc. R. Co. v. Clemmons*, 55 Tex. 88). But *quere*?

⁹ So held, where passenger needlessly rambling across dangerous platforms, at night, fell through (*State v. Maine Cent. R. Co.*, 81 Me. 84; 16 Atl. 368). A passenger on a train in motion, who attempted to pass from one car to another, and in doing so was thrown from the platform by a sudden jerk of the train, could not recover, though the coupling between the cars was defective (*Bemiss v. New Orleans, etc. R. Co.*, 47 La. Ann. 1671; 18 So. 711). See *Coleman v. Second Ave. R. Co.*, 114 N. Y. 609; 21 N. E. 1064 [swinging around platforms may be negligence]; *Burt v. Douglas Co. R. Co.*, 83 Wisc. 229; 53 N. W. 447 [same; not question of law]. It is not negligence *per se* for a passenger to leave his seat in a passenger-car, and go

into a baggage-car, and afterwards undertake to return, so as to bar a recovery for his death caused by falling between the cars (*Louisville, etc. R. Co. v. Berg*, 93 Ky. 189; 32 S. W. 616).

¹⁰ It is not negligence *per se* for a passenger on a rapidly moving train to pass out of one car into another, in search of a seat (*Chesapeake, etc. R. Co. v. Clowes*, 93 Va. 189; 24 S. E. 833). To same effect, *Lent v. N. Y. Central R. Co.*, 120 N. Y. 467; 24 N. E. 653; *aff'd* 54 N. Y. Superior, 317; *Hannibal, etc. R. Co. v. Martin*, 111 Ill. 219. But such a change must be made with care commensurate with the danger; and one "not looking" may not recover (*Snowden v. Boston, etc. R. Co.*, 151 Mass. 220; 24 N. E. 40).

¹¹ *Andrist v. Union Pac. R. Co.*, 30 Fed. 345.

¹² A passenger could not find a seat. After the cars had started, an officer ordered the standing passengers to pass forward. In stepping from one car to another, the passenger slipped between the cars and was instantly killed. *Held*, she was not so clearly guilty of negligence as to warrant taking the case from the jury (*McIntyre v. N. Y. Central R. Co.*, 43 Barb. 532; *aff'd*, 37 N. Y. 287). *s. p.*, *Hannibal, etc. R. Co. v. Martin*, 111

passengers have a right to rely upon the judgment of the officers of the train in respect to such matters, and are bound to obey their reasonable directions.

§ 525. **Crossing tracks.** — Railroads are frequently so constructed that it is absolutely necessary for passengers to cross tracks on their way to or from trains;¹ and in other cases the arrangements are such as to make it very inconvenient to do otherwise;² while in still others, passengers make a practice of crossing tracks at stations, without objection from the railroad companies.³ In any of these cases, the mere crossing of the tracks by a passenger, on his way to or from a train, raises no presumption of negligence against him.⁴ If the company desires to be relieved from liability for injuries thus caused, it must provide good, safe and convenient means of access. Where a passenger is required to cross the company's intervening tracks, in order to take⁵ his train or to leave

Ill. 219; Louisville, etc. R. Co. v. Kelly, 92 Ind. 371. See Davis v. Louisville, etc. R. Co., 69 Miss. 136; 10 So. 450.

¹ Plaintiff was set down at a switch and crossed the track to go home, when struck by a train, giving no warning. Verdict for plaintiff sustained (Franklin v. Southern Cal. R. Co., 85 Cal. 63; 24 Pac. 723). See also notes 5, 6 and 7, *infra*.

² A flight of steps descended from a station to an unimproved street, passing under the tracks, with uneven surface, down which ran a large stream, making the ground marshy. It was the universal custom to cross over the tracks. Held, that there was no absolute obligation upon a passenger, alighting from a train on a dark night, the street being unlighted, to use it in crossing the railroad to reach his home (Chicago, etc. R. Co. v. Lowell, 151 U. S. 209; 14 S. Ct. 281).

³ Passenger held not in fault in such a case; although there was a

rule forbidding such crossing (Chicago, etc. R. Co. v. Lowell, *supra*).

⁴ Deceased, after leaving a train at night, at a small way station, started towards the station, stepped upon an intervening track, which had been leveled up with earth, and was struck by a train which was moving rapidly without ringing a bell. There was some evidence that he did not know that he was walking upon a track. There was no light except a bonfire and the locomotive headlights. Held, that deceased was not necessarily guilty of contributory negligence (Richmond, etc. R. Co. v. Powers, 149 U. S. 43; 13 S. Ct. 748).

⁵ Terry v. Jewett, 78 N. Y. 338. Where a passenger was standing on a station platform and about to cross the track in order to take his own train, with his back turned toward an approaching train of whose approach he received no warning; held, that the fact that he did not look to see if a train was approaching, was not conclusive of his negli-

it,⁶ or to change from one train to another,⁷ it is not negligence *per se* not to look and listen for approaching trains before so crossing.⁸ The passenger has a right to assume that the company will so regulate its trains that the road will be free from obstructions and danger when passenger trains stop at a depot to receive and deliver passengers; and the rule which requires a person to look and listen before crossing a railroad track has little, if any, application, where, by the arrangement of the company, it is made necessary for passengers to cross the track in passing to and from the depot to the cars.⁹ It has been

gence, but was properly submitted to the jury, and their finding in his favor was not disturbed (*Sohier v. Boston, etc. R. Co.*, 141 Mass. 10; 6 N. E. 84). *s. p.*, *Chaffee v. Boston, etc. R. Co.*, 104 Mass. 108; *Hirsch v. New York, etc. R. Co.*, 53 Hun, 633; 6 N. Y. Supp. 162. The plaintiff was held negligent in *De Kay v. Chicago, etc. R. Co.*, 41 Minn. 178; 43 N. W. 182; *Enk v. Brooklyn R. Co.*, 64 Hun, 634; 19 N. Y. Supp. 130; and *Winslow v. Boston, etc. R.*, 165 Mass. 264; 42 N. E. 1133.

⁶ *Baltimore, etc. R. Co. v. State*, 81 Md. 371; 32 Atl. 201 [steam train]; *Cincinnati R. Co. v. Snell*, 54 Ohio St. 197; 43 N. E. 207 [street-car]. A local train did not stop at the regular station, but at a point 1,300 feet further east, where there were twenty tracks, and nothing to indicate on which side passengers should leave the train. Deceased received no warning of an approaching train and did not look for it. Held, not contributory negligence as matter of law (*Brassell v. N. Y. Central R. Co.* 84 N. Y. 241). See *Gaynor v. Old Colony, etc. R. Co.*, 100 Mass. 208. In Massachusetts, it is held, that a passenger crossing tracks in accordance with custom is bound to look and listen (*Connelly v. New England R. Co.*, 158 Mass. 8; 32 N. E. 937). The decision was made by a divided

court, on the authority of previous decisions which had really no bearing on the case at bar; while the cases in point were not referred to.

⁷ *Baltimore, etc. R. Co. v. State*, 60 Md. 449.

⁸ Whether one who, relying on a custom not to run trains between a depot and a train standing opposite, is guilty of contributory negligence in going on the intervening track, to get matter from the train, without looking to see if another train is approaching, is a question for the jury (*Tubbs v. Michigan Cent. R. Co.*, Mich. ; 64 N. W. 1061). And one having business with a train is not necessarily negligent, in failing to select the very best place to cross (*Williams v. Louisville, etc. R. Co.*, 98 Ky. 247; 32 S. W. 934). Where one alighting from a train, disregards the conductor's warning to look out, a nonsuit is proper (*Meserole v. Brooklyn R. Co.*, 57 Hun, 591; 10 N. Y. Supp. 813).

⁹ *Klein v. Jewett*, 26 N. J. Eq. 474. Where a planked crossing was provided over double tracks, a passenger who was struck by a train, while using the crossing, held, not conclusively negligent (*Mayo v. Boston, etc. R. Co.*, 104 Mass. 137). In *Wendell v. Corbin* (38 Hun, 391), it was held that a passenger leaving a car at a switch-station and crossing

held, however, to be contributory negligence for a passenger to pass between the cars of an intervening train, which is ready to start, without the permission of those in charge,¹⁰ or to pass in front of a rapidly approaching train or other vehicle in full view,¹¹ or, having left his train before it stopped, to cross intervening tracks without looking and listening for approaching trains,¹² or to cross tracks obviously not intended for such use, without necessity.¹³ In some cases, circumstances may justify a passenger in walking even *along* the track.¹⁴

§ 526. Care of passengers' personal effects. *— A carrier is not liable, as such, for the safety of baggage or other per-

an intervening track to a switch-house to procure a drink of water, he being unable to find any upon the train, was not guilty of contributory negligence, as matter of law.

¹⁰ *Chicago, etc. R. Co. v. Coss*, 73 Ill. 394.

¹¹ *Chaffee v. Old Colony R. Co.*, 17 R. I. 658; 24 Atl. 141; *Halpin v. Third Ave. R. Co.*, 40 N. Y. Superior, 175.

¹² *Parsons v. N. Y. Central R. Co.*, 37 Hun, 128; *Commonwealth v. Boston, etc. R. Co.*, 129 Mass. 500. In the last case, the court said that by leaving the train before it stopped the passenger ceased to be such, and assumed all risk of injury.

¹³ *Parsons v. N. Y. Central R. Co.*, 85 Hun, 23; 32 N. Y. Supp. 598.

¹⁴ *Cameron v. Union Line*, 10 Wash. St. 507; 39 Pac. 128 [walking along street-car track, without looking or listening]. Where a passenger, who is not in fault, is put off a train upon the track, in the darkness, he is not chargeable with negligence in walking on the track to a station near by (*Houston, etc. R. Co. v. Devainy*, 63 Tex. 172). Otherwise, if there is any other safe and convenient route (*Verner v. Alabama R. Co.*, 103 Ala. 574; 15 So. 872). To

same effect, *Ham v. Delaware, etc. Canal Co.*, 155 Pa. St. 548; 26 Atl. 757; *Malone v. Pittsburgh, etc., R. Co.*, 152 Pa. St. 390; 25 Atl. 638; *Huckel v. Same*, 152 Pa. St. 394; 25 Atl. 639). On failure of the company to provide a convenient passage through snow from its depot to the highway, a passenger may use the track as a way of exit, and may presume that one part of the track is as safe as another (*Hoffman v. N. Y. Central R. Co.*, 75 N. Y. 605). Where a passenger, to reach the highway, must either walk along the track or trespass on private property, it is for the jury to say whether he is guilty of contributory negligence in using the tracks (*Reid v. New Haven, etc. R. Co.*, 63 Hun, 630; 17 N. Y. Supp. 801). But for a doubtful case, in which it was held contributory negligence to walk along a track at night, and that the jury should have been instructed to find for the defendant, see *St. Louis, etc. R. Co. v. Whittle*, 20 C. C. A. 196; 74 Fed. 296.

* In accordance with the statement at the head of this chapter, we omit from this section any consideration of a carrier's liability for the loss of passengers' checked baggage, as such liability is independent of the carrier's negligence.

sonal effects of a passenger, not delivered into his possession and custody, and which the passenger chooses to keep on or about his person, and in his own care and possession.¹ Otherwise, if the carrier or his agent is entrusted with their safe keeping, in which case his liability for their loss is absolute, without proof of negligence. It is held that the personal effects of a passenger occupying a steamboat stateroom are, in legal effect, in the custody of the carrier; and the latter is therefore liable for their loss by theft therefrom, there being no fault on the part of the passenger.² And we do not see why the rule should not be applied to the case of a passenger occupying a separate room or compartment in a sleeping-car on a railroad train, capable of being made secure against intrusion like a stateroom. But for obvious reasons, the rule of absolute liability of a carrier of goods or innkeeper is not extended to cases of theft from passengers occupying berths in a sleeping-car, which, according to the customary arrangement, is one room common to all, the berths being one above another, and separated from the common passageway by curtains only, and

¹ *Tower v. Utica, etc. R. Co.*, 7 Hill, 47 [passenger left his overcoat on seat when he left train]; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44 [a passenger's portmanteau stolen while he left it and rode in another car]. A ferry company is not liable to a passenger for the loss of his team, which he drove on its boat and kept under his own control and did not watch with proper care (*Dudley v. Camden, etc. Ferry Co.*, 42 N. J. Law, 25; *Evans v. Rudy*, 34 Ark. 383).

² A steamboat company is liable to a passenger for the loss by theft from his stateroom, without his fault, of a sum of money reasonable and proper for him to carry for traveling expenses, without proof of negligence on its part (*Adams v. N. J. Steamboat Co.*, 151 N. Y. 163; 45 N. E. 369; aff'g 9 Misc. 24; 29 N. Y. Supp. 56). "If any of the articles or money which a passenger properly has with

him in a stateroom is stolen, the presumption is that the theft was in consequence of the default of the carrier; and this presumption can be repelled only by proof that the loss was attributable to the negligence or fraud of the passenger, or of the act of God, or of the public enemy" (*Crozier v. Boston, etc. Steamb. Co.*, 43 How. Pr. 466; cited with approval in above case). In *Dunn v. New Haven Steamb. Co.* (58 Hun, 461; 12 N. Y. Supp. 406), a passenger by defendant's steamboat, on retiring at night to the berth assigned him [*not* stateroom], placed his vest containing seventy-three dollars, watch, railroad tickets, etc., under his pillow. The vest and its contents were stolen during the night. Held, the direction of a verdict for defendant was error. Plaintiff had the right to have his money with him in his berth.

ordinarily with no place assigned for passengers' clothing, money, etc., on retiring at night. It is properly held, in view of such arrangements, and of the powerlessness of a sleeping passenger to defend his property from theft or his person from assault, that it is part of the contract of hiring the privilege of occupying a berth that protection should be afforded him by the car-proprietor, with a degree of care and vigilance commensurate with the danger to which he is exposed.³ Such a passenger distinctly contracts to be saved the necessity of sitting up all night to watch his baggage to prevent its being stolen.⁴ Slight evidence of the absence of watchfulness on the part of those in charge of the car to prevent robbery will therefore be sufficient to warrant the submission of their negligence to the jury.⁵ But in the absence of *any* proof of negligence in this

³ *Carpenter v. N. Y., New Haven, etc. R. Co.*, 124 N. Y. 53; 26 N. E. 277. The car company "impliedly agrees to watch over him while asleep and take reasonable care to prevent the theft of his goods and money from his person, either by unauthorized intruders or by occupants of car" (*Woodruff Sleeping Coach Co. v. Diehl*, 84 Ind. 474 [money and watch under pillow; gone in morning; verdict for plaintiff sustained]). A company "running coaches with section separated from the aisle only by curtains is bound to have an employee charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleeping passengers" (*Pullman Car Co. v. Gardner* [Pa. Sup. Ct.], 3 Pennypacker, 78).

⁴ A passenger has "a right to take valises, containing his wearing apparel and other articles conducive to comfort and cleanliness, into sleeping coaches, and he is not bound to sit up all night and watch it to keep it from being stolen" (*Stevenson v. Pullman Car Co.* [Tex. Civ. App.], 26 S. W. 112; 32 Id. 335).

⁵ In *Carpenter v. N. Y., New Haven, etc. R. Co.* (124 N. Y. 53; 26 N. E. 277 [property stolen]), it was held that, considering that the sections of the car were separated from the aisle only by curtains, and also considering the importance of the route between two great cities, and the stoppages frequently made at other considerable cities, and that but a single porter was employed on the car, who, besides being obliged to assist passengers in entering or leaving the car at the different stoppages, was also allowed to render services to the passengers for his own profit, there was enough to put the carrier to the proof of the care he took of the occupants of the car, and in the absence of any explanation on his part, a nonsuit was improper. In *Lewis v. N. Y. Sleeping Car Co.*, (143 Mass. 267; 9 N. E. 615, [theft]), the fact that the porter of the car was found asleep at an early hour in the morning in a position from which no view could be had of that part of the car where passengers were asleep, and that he was required to be on duty for thirty-six hours continuously, including two

respect, a nonsuit is proper.⁶ If the property lost had been delivered into the care of the person in charge of the car,⁷ or has been stolen by him,⁸ the company's liability is absolute. The baggage, for the negligent loss of which a sleeping-car company is liable, includes only what would be considered such in an action against a common carrier of passengers, as such, and therefore does not embrace a sum of money in excess of what was reasonably necessary for the purposes of the journey,⁹ unless the loss was through theft committed by the company's agent in charge, in which case there is no such limitation of liability.¹⁰ The negligence of the passenger in leaving his money in an exposed position in his berth will bar his recovery¹¹ unless, indeed, it was stolen by the porter in

nights, held to warrant submission of defendant's negligence to jury. *s. p.*, *Blum v. So. Pullman Car Co.* [U. S. C. C.], 1 Flippin, 500 [both conductor and porter of car were asleep for two or three hours before train reached its destination, leaving front door unlocked and brakeman sitting on front platform]; *Pullman Car Co. v. Taylor*, 65 Ind. 153; *Pullman Car Co. v. Martin*, 92 Ga. 161; 18 S. E. 364 [demurrer].

⁶ Mere proof of loss of an article is not enough (*Welch v. Pullman Car Co.*, 16 Abb. Pr. N. S. 352 [said to have been affirmed in Ct. of App.; see 151 N. Y. 163]; *Tracy v. Pullman Car Co.*, 67 How. Pr. 154; *Pullman Car Co. v. Smith*, 73 Ill. 360; *Efron v. Wagner Car Co.*, 59 Mo. App. 641).

⁷ A sleeping-car company is liable as a common carrier for the preservation of a passenger's baggage while intrusted to its porter to be taken from the car to the waiting-room of the depot (*Voss v. Cleveland, etc. R. Co.* [Ind. App.], 43 N. E. 20 [article left behind in car and lost]; *Pullman Car Co. v. Lowe*, 28 Neb. 239; 44 N. W. 226 [overcoat placed in care of porter]). See cases cited in note 16, *post*.

⁸ *Pullman Car Co. v. Martin*, 95

Ga. 314; 22 S. E. 700 [theft of money and jewelry by porter]; *Pullman Car Co. v. Gavin*, 93 Tenn. 53; 23 S. W. 70 [money]; *Root v. N. Y. Cent. Car Co.*, 28 Mo. App. 199 [money]. There being evidence to sustain a finding either that there was no theft or that the porter committed it, a verdict for plaintiff was allowed to stand (*Pullman Car Co. v. Matthews*, 74 Tex. 654; 12 S. W. 744).

⁹ *Hampton v. Pullman Car Co.*, 42 Mo. App. 134; *Root v. N. Y. Sleeping Car Co.*, 28 Id. 199; *Wilson v. Baltimore, etc. R. Co.*, 32 Id. 682.

¹⁰ *Pullman Car Co. v. Martin*, 95 Ga. 314; 22 S. E. 700 [porter stole \$35 in money and \$700 worth of jewelry used for the personal adornment of the passenger; company liable].

¹¹ *Root v. N. Y. Sleeping-Car Co.*, 28 Mo. App. 199; *Wilson v. Baltimore, etc. R. Co.*, 32 Mo. App. 682 [passenger left \$670 in vest pocket under his pillow while he went to closet; held, gross negligence]. For a passenger to deposit clothing, etc., in a vacant upper berth directly above him, the use of which he had not purchased or secured, held not such contributory negligence as to bar recovery for their loss (*Florida v. Pullman Car Co.*, 37 Mo. App. 598).

charge.¹² The duty of watchfully guarding sleeping passengers cannot be avoided by a notice posted in the car, or words printed on the passenger's ticket, disclaiming liability for the loss of passengers' valuables.¹³ The person in charge of a sleeping or drawing-room car, attached to a railroad train by which a carrier undertakes to transport a passenger, is a servant of the latter, although the car is the property of another, by whom the person in charge was employed. Hence the carrier and the sleeping-car proprietor are jointly and severally liable for such person's negligent management of the car,¹⁴ or for his tort committed on a passenger,¹⁵ or his loss of property placed in his care and possession.¹⁶

§ 527. [omitted.]

¹² Pullman Car Co. v. Matthews, 74 Tex. 654; 12 S. W. 744.

¹³ Lewis v. N. Y. Sleeping-Car Co., 143 Mass. 267; Stevenson v. Pullman Car Co., Tex. Civ. App. ; 26 S. W. 112.

¹⁴ Pennsylvania Co. v. Roy, 102 U. S. 451 [fall of berth in sleeping-car]; Cleveland, etc. R. Co. v. Walrath, 38 Ohio St. 461 [same].

¹⁵ "Persons in charge of drawing-room cars are to be regarded and treated in respect to their dealings with passengers as the servants of the railroad company, and he latter is responsible for their acts to the same extent as if they were directly employed by it" (Andrews, J., Thorpe v. N. Y. Central R. Co., 76 N. Y. 402 [assault by porter]); followed, Dwinelle v. N. Y. Central R. Co., 120 N. Y. 117; 24 N. E. 319 [same]; Williams v. Pullman Car Co., 40 La. Ann. 417; 3 So. 631 [same]; Campbell v. Pullman Car Co., 43 Fed. 484 [porter's indecent assault on female passenger].

¹⁶ The carrying company cannot limit its liability by any special arrangement with the sleeping car company, because, so long as the sleeper forms part of the train, negligence on the part of the sleeping-

car agents is the negligence of the railroad company running the train (Louisville, etc. R. Co. v. Katzenberger, 16 Lea, 380 [baggage given in charge of porter]). Passenger was informed by employee in charge of sleeping-car that his hand-bag would be safe while he left car to go to dinner. On his return he found car switched off and locked, and was then told it was on another car. Carrying company held liable for loss of bag (Kinsley v. Lake Shore R. Co., 125 Mass. 54). In Kates v. Pullman Car Co. (95 Ga. 810; 23 S. E. 186), plaintiff, on entering defendant's sleeping-car, was told by the conductor that the car would go through to his destination, and that he might go to bed, which he did. Before reaching his destination he was suddenly aroused and told to hurry to get into the next car, as the car in which he was would go no further, whereupon he rose hurriedly and carried his clothes to the next car, and an hour later discovered the loss of money from his vest, which he had placed under his pillow on retiring, and duly notified the defendant. Held, a nonsuit was error.

CHAPTER XXIII.

TELEGRAPHS.

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| <p>§ 528. Nature of the business.
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 530. Risks to which it is exposed.
 531. Statutory regulations.
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§ 528. **Nature of the business.**— In almost all cases upon which any litigation can arise, a single telegraphic operation includes eight distinguishable acts, namely: (1) The reception of a written message; (2) the translation of this message into telegraphic letters; (3) the impression of the translated message upon the machine connecting with the wire; (4) the transmission of the message along the wire; (5) the reception into the mind of the operator at the other end of the sounds or marks by which the telegraph announces the message; (6) the mental translation of these sounds or marks into ordinary language; (7) the writing out of the message thus received; (8) the delivery of the written message to the person for whom it

is destined. Where the printing telegraph is used, which prints the identical paper delivered, the sixth and seventh of these acts are dispensed with. In the great majority of telegraph offices, however, the message is communicated to the receiving operator only by sound.

§ 529. **Its peculiarities.**—In so far as the original reception and final delivery of messages are concerned, the business of a telegraph company is not peculiar or difficult. But the other part of its work is *sui generis*. The message must be put upon the wire by a series of longer or shorter pressures of the operator's finger. If he keeps his finger down a second too long or raises it a second too soon, he will destroy the meaning of the message, as will be seen when we describe the form in which it arrives at the other end of the line. The electricity which is let loose by the operator's finger then passes along the wire, and delivers a series of shocks at every office, corresponding in length with the fingering of the operator. The particular operator who, by a peculiar signal, has been warned to prepare for messages, then listens to a series of snapping sounds, unintelligible to untrained ears, but which he is able to translate into letters of the alphabet. Or, as was formerly the case in all offices, and is now the practice in some, his machine slowly rolls off a narrow slip of paper, printed somewhat after this fashion: — — — — — and so on at great length. Now we will suppose that this sign means "casks." In that case, — — — — — will probably mean "sacks;" a difference of which the indications are very slight; but which may, and in one case¹ did involve the loss of thousands of dollars.

§ 530. **Risks to which it is exposed.**—It will be seen, from this very brief survey, how delicate are the materials with which a telegraph company must work, and how much exposed it is to the risk of mistake and interruption. The least inattention on the part of the operator at either end may cause a monstrous perversion of the message; while a storm, or a sur-

¹ Leonard v. N. Y., Albany, etc. Tel. Co., 41 N. Y. 544. For other illustrations of these slight differences in the telegraphic alphabet, see Pinckney v. Western U. Tel. Co., 19 S. C. 71.

charge of electricity in the atmosphere, may interrupt communication upon the wires altogether. The injury thus caused to the parties interested in a message is frequently great — sometimes enormous. An error in a message will generally make it unintelligible, in which case the remedy is easy; the receiver telegraphing back for a correction. But if the mistake leaves the message intelligible, the error is attended with more dangerous consequences, as the receiver suspects nothing, and makes no inquiries; so that, unless special orders have been given to him to repeat the message, neither operator discovers that any mistake has been made. On the other hand, after the message is once received at the delivery office, there are no difficulties in the service, which are not common to all business.

§531. Statutory regulations. — In many states there are statutes, requiring telegraph companies to receive and transmit messages with impartiality, good faith and diligence, whether from customers or from connecting lines, and imposing penalties upon them for violation of these rules.¹ The existence of

¹ *New York*: Stat. 1890, ch. 566, § 103.

Arkansas: Stat., March 31, 1885, § 10. See *Frauenthal v. Western U. Tel. Co.*, 50 Ark. 78; 6 S. W. 236.

Georgia: Stat. Oct. 22, 1887; Nov. 12, 1889. To bring a case within the Georgia statute, the message must be actually prepaid (*Western U. Tel. Co. v. Ryals*, 94 Ga. 336; 21 S. E. 573; *Western U. Tel. Co. v. Power*, 93 Ga. 543; 21 S. E. 51; *Langley v. Western U. Tel. Co.*, 88 Ga. 777; 15 S. E. 291). What persons are not entitled to the benefit of these statutes, as residents, etc.: *Western U. Tel. Co. v. Murphey*, 96 Ga. 768; 22 S. E. 297; *Moore v. Western U. Tel. Co.*, 87 Ga. 613; 13 S. E. 639; *Western U. Tel. Co. v. Timmons*, 93 Ga. 345; 20 S. E. 649; *Western U. Tel. Co. v. Patrick*, 92 Ga. 607; 18 S. E. 980. Who are so entitled: *Western U. Tel. Co. v. Edwards*, 96 Ga. 757; 22

S. E. 326; *Horn v. Western U. Tel. Co.*, 88 Ga. 538; 15 S. E. 16; *Western U. Tel. Co. v. Mansfield*, 93 Ga. 349; 20 S. E. 650. Payment of damages not a bar to action for penalty (*Western U. Tel. Co. v. Brightwell*, 94 Ga. 434; 21 S. E. 518). Refunding toll no bar (*Western U. Tel. Co. v. Moss*, 93 Ga. 494; 21 S. E. 63). Company is not liable to penalty under act 1887, for verbal inaccuracy in transmitting sender's surname (*Western U. Tel. Co. v. Rountree*, 92 Ga. 611; 18 S. E. 979; *Wolf v. Western U. Tel. Co.*, 94 Ga. 434; 19 S. E. 717). Nor where failure to deliver message promptly was due to the fact that the wires were out of repair, and the wires were repaired with reasonable promptitude (*Western U. Tel. Co. v. Davis*, 95 Ga. 522; 22 S. E. 642). It makes no difference whether message was delivered for transmission directly by the sender,

such a statute, however, is not understood to exclude the bringing of actions founded on the common-law doctrine of negligence, or on breach of contract; and, moreover, messages from one state to another, since they fall within the domain of the exclusive congressional power to regulate commerce, cannot be regulated by state statutes.² The cases which have

or by another telegraph company (*Conyers v. Postal Tel. Co.*, 92 Ga. 619; 19 S. E. 253).

Indiana: Horner's Stat. 1896, c. 42, §§ 4176, 4177. The Indiana statute applies only to acts or omissions involving partiality or bad faith, and no penalty can be recovered thereunder for a mere negligent failure to transmit a message (*Western U. Tel. Co. v. Jones*, 116 Ind. 361; 18 N. E. 539). It does not apply to a message sent from another state to a place within the state (*Rogers v. Western Union Tel. Co.*, 122 Ind. 395; 24 N. E. 157). When company is liable, see *Western U. Tel. Co. v. Moore*, 12 Ind. App. 136; 39 N. E. 874; *Western U. Tel. Co. v. McKibben*, 114 Ind. 511; 14 N. E. 894; *Western U. Tel. Co. v. Griffin*, 1 Ind. App. 46; 27 N. E. 113. When not liable, see *Reese v. Western U. Tel. Co.*, 123 Ind. 294; 24 N. E. 163; *Hadley v. Western U. Tel. Co.*, 115 Ind. 191; 15 N. E. 845; *Peterson v. Western U. Tel. Co.*, 10 Ind. App. 227; 37 N. E. 810; *Western U. Tel. Co. v. Bierhaus*, 8 Ind. App. 563; 36 N. E. 161.

Mississippi: Code 1892, § 4326; *Western U. Tel. Co. v. Allen*, 66 Miss. 549; 6 So. 461; *Wilkins v. Western U. Tel. Co.*, 68 Miss. 6; 8 So. 678; *Western U. Tel. Co. v. Jones*, 69 Miss. 658; 13 So. 471; *Western U. Tel. Co. v. Clarke*, 71 Miss. 157; 14 So. 452.

Missouri: Rev. St. 1889, § 2725; *Wood v. Western U. Tel. Co.*, 59 Mo. App. 236; *Smith v. Western U. Tel. Co.*, 57 Id. 259; *Kendall v. Western*

U. Tel. Co., 56 Id. 192; *Dudley v. Western U. Tel. Co.*, 54 Id. 391; *Brashears v. Western U. Tel. Co.*, 45 Id. 433; *Burnett v. Western U. Tel. Co.*, 39 Id. 599; *Thompson v. Western U. Tel. Co.*, 32 Id. 191.

In *Tennessee*, the statute (Code Mill. & V. § 1541) gives a right of action to "the party aggrieved," for a company's default in transmitting a message. See *Wadsworth v. Western Union Tel. Co.*, 2 Pickle, 695; 8 S. W. 574; *Western U. Tel. Co. v. Mellon*, 96 Tenn. 66; 33 S. W. 725.

In *Nebraska*, by Comp. St. c. 89a, § 12, a telegraph company is "liable for the non-delivery of dispatches entrusted to its care and for all mistakes in transmitting messages made by any person in its employ * * * and shall not be exempted from any such liability by reason of any clause, condition or agreement contained in its printed blanks." See *Western U. Tel. Co. v. Kemp*, 44 Neb. 194; 63 N. W. 451; *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732; 49 N. W. 707.

In *North* and *South Dakota* the Civil Code (adopted in 1864) provides that "every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto." This statute, being penal, must be strictly construed (*Kirby v. Western U. Tel. Co.*, 4 S. D. 463; 57 N. W. 202).

² *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347; 7 S. Ct. 1126;

arisen under these statutes are, however, referred to under other sections, in so far as they throw light on the statutory or common-law liability for negligence or breach of contract.

§ 532. **Obligations not merely in contract.** — The first question to be determined in respect to the liability of telegraph companies for negligence is, whether their obligations are or are not founded purely and necessarily upon contracts with those who employ them. It has been said in England that they are.¹ But this opinion has been entirely overruled in America.² These companies are chartered by the state for public purposes; they are allowed to take private property on the pretext of public use; they are required by law to receive and transmit messages; and there is no reason for doubting that they are liable for negligence in such transmission, independently of any contract. In most American courts they cannot (as will presently be seen) even enforce a contract limiting their liability, except so far as it is reasonable.³

§ 533. [consolidated with § 536.]

§ 534. **Telegraph companies common carriers.** — The courts have often discussed the question whether telegraph companies are or are not common carriers; and it was once frequently said that they are not. But the language of the judges in those cases was unnecessarily broad; the real question before them being, at the most, whether telegraph companies were subject to the strict responsibility of common carriers of goods, which, of course, they are not. Moreover, in nearly all these cases, judgment was finally rendered against the telegraph companies; and the opinions of the courts were, therefore,

overruling *Western U. Tel. Co. v. Hamilton*, 50 Ind. 181. But it is held competent for the legislature to impose a penalty on telegraph companies for failure to transmit messages though their destination is beyond the state (*Western U. Tel. Co. v. Michelson*, 94 Ga. 436; 21 S. E. 169).

¹ *Playford v. United K. Tel. Co.*, L. R. 4 Q. B. 706; *Allen, J.*, in *Leonard v. N. Y., Albany, etc. Tel.*

Co., MS. This is *not* the decision which, in the same case, was affirmed in the Court of Appeals.

² *De Rutte v. N. Y., Albany, etc. Tel. Co.*, 1 Daly, 547; *N. Y. & Washington Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422; *Western U. Tel. Co. v. Carew*, 15 Mich. 525.

³ See § 553, *post*.

expressed without that valuable restraint which arises from a consciousness that the words used are really deciding an actual controversy.¹ In the later and better considered decisions, the courts have more and more inclined to the opinion that telegraph companies are common carriers of messages;² the applicability of much of the law of carriers to telegraphs is expressly recognized;³ the early idea of the right of telegraph companies to limit their liabilities in any other manner than that which is allowed to carriers is almost universally repudiated;⁴ and we

¹ This was the case in *Leonard v. N. Y., Albany, etc. Telegraph Co.*, 41 N. Y. 544; *Breese v. U. S. Tel. Co.*, 45 Barb. 274; 48 N. Y. 132; *Birney v. N. Y. & Washington Tel. Co.*, 18 Md. 341; *Western U. Tel. Co. v. Carew*, 15 Mich. 525. See also *Kiley v. Western U. Tel. Co.*, 109 N. Y. 231. In *Schwartz v. Atlantic, etc. Tel. Co.* (18 Hun, 158), the question did not arise; and the *dictum* of the court only goes to the point that such companies are not subject to the liability of goods-carriers; as to which there is no dispute. In *Pinckney v. Western U. Tel. Co.*, (19 S. C. 71), the judge instructed the jury that proof of due care was a good defense. Held, not error. The court say: "Our opinion is that telegraph companies, as to the work which they are engaged to do, belong to that department known as bailment, especially to that class styled *locatio operis faciendi*, and they are generally governed by the principles of law which have long since been established in reference to this department." In *Western U. Tel. Co. v. Fontaine* (58 Ga. 433), the judge charged the jury that the company was a quasi-common carrier, and, as such, liable for its failure to deliver messages. This charge was held error; and the liability was defined as that of a bailee for hire; and the court add that under the law of Georgia bailees are not insurers, but

are held only to the exercise of ordinary care and diligence. The verdict being deemed just, however, the court declined to set it aside on the ground of the error. In the more recent case of *Western U. Tel. Co. v. Blanchard* (68 Ga. 299), the opinion expressed by Jackson, J., in the *Fontaine* case, that the business is very similar to that of carriers, is approved. In California, the statute expressly excepts carriers of telegraphic messages from the definition of common carriers (Civil Code, § 2168), but requires carriers of messages for reward "to use great care and diligence" (Id. § 2162).

² In *Baldwin v. U. S. Tel. Co.* (1 Lans. 125), it was expressly held that a telegraph company is a common carrier of messages, bound to receive and transmit messages for every one, on equal terms. In *Telegraph Co. v. Texas* (105 U. S. 460), the U. S. Supreme Court say: "A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does, as a carrier of goods." A telegraph company is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers (*Western U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326; 62 N. W. 506).

³ *Ellis v. Amer. Tel. Co.*, 13 Allen, 226.

⁴ See § 553, *post*.

are not aware of a single reported decision which is necessarily inconsistent with the theory that these companies are common carriers of messages. Of course, they are not subject to the stringent liability of goods-carriers, as insurers;⁵ but we entertain no doubt that they are common carriers of messages, subject to all the rules which, in their nature and by fair analogy, are applicable to all classes of common carriers.

§ 535. **Reasons for considering them such.** — The attempt, so persistently made, to prove that telegraph companies are not common carriers, is ingeniously pressed upon the ground that they do not really “carry” the message which they transmit. By dwelling upon this minor point, which is of no importance, shrewd counsel have often succeeded in persuading less shrewd judges to express an opinion in favor of these corporations upon the other point, which is of great importance. The real question at issue is whether these corporations are bound by those general rules which govern common carriers of goods or persons, not because they are *carriers*, but because they are *common* carriers. The whole aim of these arguments is to relieve telegraph companies from all common-law duties, and to leave them free to take or refuse messages on reasonable or unreasonable terms, or no terms at all, and to limit or wholly annul their own liability for neglect, according to their own arbitrary will and pleasure. Except for this purpose, no telegraph company would take the slightest interest in the controversy. It is because *common* carriers, whether of property or of persons, are bound by the common law to treat the public fairly and reasonably, and to serve the public on a footing of substantial equality, that telegraph companies fight so strenuously against the application of these reasonable rules to their transactions. But the simple fact that these companies are authorized to lay their wires over or under private property is conclusive upon this question: for no legislature in the United States could grant this power to any person or corporation which did not conduct its business for the public benefit, since to attempt to do so would be a violation of the constitutional

⁵ *Western U. Tel. Co. v. Neil*, 57 Tex. 283, s. p., *Baxter v. Dominion Tel. Co.*, 37 Upp. Can. [Q. B.], 470; and other cases cited under § 537, *post*.

prohibition against taking private property for private use. These companies certainly are *common transmitters* of messages; and, as such, they are subject to all the rules which, at common law, govern common carriers of persons, so far as, in their nature, those rules are applicable.

§ 536. Obligation to furnish telegraphic facilities. — As common carriers, or as common transmitters, if they prefer a distinction without a difference, telegraph companies are bound, at common law, equally with common carriers of persons, to receive and transmit telegraphic communications and furnish telegraphic facilities for all persons, at uniform rates and under reasonable and uniform conditions.¹ They may indeed make differential rates in favor of long messages or of a large business, or in favor of the public press or the government, or for any other good reason applying generally and uniformly to a class of cases within which any person could freely enter upon like conditions. They may refuse to allow the use of their wires for unlawful or immoral purposes.² But they may not arbitrarily exclude any person from the use of the wires which they have been allowed by the state to lay over both public and private property. These rules are generally prescribed by statute; but they are not dependent upon statutes for their existence. They are founded upon the essential nature of a telegraph company, as the possessor of a franchise entrusted to it for the public benefit. The same principles apply to telephone companies.³

¹ Tyler v. Western U. Tel. Co., 60 Ill. 421. Upon the same principle, a company organized for the purpose of transmitting over its lines telegraphic intelligence to all customers within their district who provide reporting instruments commonly called "tickers," cannot refuse to serve a person within the district who has such an instrument and is willing to pay the price (Friedman v. Gold, etc. Tel. Co., 32 Hun, 4).

² See § 538. *post*.

³ Comm'l U. Tel. Co. v. N. E. Telephone Co., 61 Vt. 241; 17 Atl. 1071; People v. Telephone Co., 19

Abb. N. C. 466; Central U. Tel. Co. v. Swoveland, 14 Ind. App. 341; 42 N. E. 1035. In Hockett v. State (105 Ind. 250; 5 N. E. 178), it is said that a telephone company is a common carrier in the same sense as a telegraph company. Its instruments and appliances are devoted to public use, and are subject to legislative control; so that the legislature of a state may prescribe the maximum charges for instruments and service. In State v. Nebraska Tel. Co. (17 Neb. 126; 22 N. W. 237), a telegraph company was required by mandamus to place and maintain in the rela-

§ 537. **Responsible only for negligence.** — So far as the transmission of messages by electricity is concerned, telegraph companies are clearly not subject to the strict rule of responsibility which the common law imposes upon common carriers of goods ; but, in analogy to common carriers of persons, they are liable only for negligence and for willful misconduct.¹ Any more stringent rule would be harsh and unjust, since telegraph wires are exposed to numerous accidents which could not be entirely prevented by any degree of human skill and prudence. Nor are atmospheric or other uncontrollable causes the only grounds of exception.² The reason of the common-law rule for holding carriers of goods to a strict responsibility does not, indeed, apply to mere messages, which cannot, in themselves, offer any such temptation to embezzlement as goods do. In the absence of a special contract, the companies are only held to exercise such care and diligence as is reasonably adequate to the faithful discharge of the duty, considering its nature.³ And, although the same reasons do not apply to the delivery of messages, after they have safely passed over the wire, the courts seem to make no distinction upon this ground.

§ 538. **Unlawful messages.** — A telegraph company may

tor's office within the district served by the company, a telephone and transmitter ; no reason why it should not extend to him the benefit of its public service being shown. The decision was put upon the ground that the telephone system, to all intents and purposes, was a part of the telegraph system, and must be held to the same obligation. To the same effect is *State v. Bell Telephone Co.* (36 Ohio St. 296), and *dictum* in *Hewlett v. Western U. Tel. Co.* (28 Fed. 181).

¹ *Leonard v. N. Y., Albany, etc. Tel. Co.*, 41 N. Y. 544 ; *Breese v. U. S. Tel. Co.*, 48 Id. 132 ; 45 Barb. 274 ; *Birney v. N. Y. & Washington Tel. Co.*, 18 Md. 341 ; *De Rutte v. N. Y. Albany, etc. Tel. Co.*, 1 Daly. 547 ; *N. Y. & Washington Tel. Co. v. Dryburg*, 35 Pa. St. 298 ; *Ellis v.*

American Tel. Co., 13 Allen, 226 ; *Western U. Tel. Co. v. Carew*, 15 Mich. 525 ; *Fowler v. Western U. Tel. Co.*, 80 Me. 381 ; 15 Atl. 29 [atmospheric influences] ; *Gulf, C., etc. Co. v. Wilson*, 69 Tex. 739 ; 7 S. W. 653.

² In *Western U. Tel. Co. v. Hope* (11 Ill. App. 289), held error to instruct the jury that if the company were prevented by atmospheric causes, it was not liable, because under the circumstances it was equivalent to saying that no excuse except one arising from atmospheric causes would relieve it. So far as *Western U. Tel. Co. v. Cohen* (73 Ga. 522) seems to hold to the contrary, it is unsupported by other cases.

³ *Western U. Tel. Co. v. Edsall*, 63 Tex. 668.

refuse altogether to accept or deliver a message which is criminal upon its face or sent for a criminal purpose, or indecent or insulting, or contrary to the policy of the law.¹ It could not refuse to receive proper messages from any one upon the mere ground that he had, on former occasions, sent improper ones, or otherwise had abused the use of the wire; but a company which makes a practice of furnishing private wires, or connecting its own wires with private offices, may refuse to furnish such accommodations to those who use these facilities for unlawful purposes, even though such wrongful use is only occasionally practiced.² So a message offered on Sunday,

¹ In *Melchert v. American U. Tel. Co.* (3 McCrary, 521; 11 Fed. 193), it was held that no recovery could be had for failure to deliver, when the purpose of the dispatch was to provide for the fulfillment of contracts, nominally for future delivery, but really to be settled on payment of differences. But compare, apparently to the contrary, as to a statutory penalty for failure to transmit and deliver prepaid messages, *Gray, v. Western U. Tel. Co.*, 87 Ga. 350; 13 S. E. 562. In *Western U. Tel. Co. v. Blanchard* (68 Ga. 299), the fact that a message sent was an instruction to make a wagering contract was held not to preclude the sender from recovering damages for a mistake, if the agents to whom it was sent could recover of the sender for money paid on the faith of the erroneous message. The rule was recognized in *Cahn v. Western U. Tel. Co.*, 48 Fed. 810; 2 U. S. App. 24; 1 C. C. A. 107; but held inapplicable on the facts. In *Western U. Tel. Co. v. Ferguson* (57 Ind. 495), it was held that the statutory penalty for refusing to send a message by telegraph is incurred, though the message was intended to accomplish immoral purposes—in this case a requisition to “send four girls to tend fair.” The court put their decision on the distinction that

messages indecent on their face may be refused, but that those not so cannot be refused by inquiring into or impugning the motives of the sender. But it cannot be possible that refusal to send a message, the sole object of which was the perpetration of a criminal act, would not be justified, however the knowledge or suspicion of motive was derived.

² In *Smith v. Western U. Tel. Co.* (84 Ky. 664; 2 S. W. 483), it was held that the company could not be required to supply a “bucket-shop” with quotations. The court approve the general rule that a telegraph company is under no obligation to contract to communicate an illegal or immoral message, and say: “A contrary rule would convert a telegraph company into a public vehicle for the purpose of communicating unlawful, treasonable or felonious schemes of all kinds, or the consummation of any and all kinds of illegal transactions and enterprises. Of course, a telegraph company, in assuming to refuse to send a message because it is illegal or immoral, acts upon its peril. If it is mistaken, or has misjudged the tenor or purpose of the message, it will be held responsible to the injured party for any damage sustained by reason of the refusal.”

showing upon its face that it is prohibited by the local Sunday law, may be refused; and, if accepted, the company cannot be held responsible for its non-delivery on Sunday.³

§ 539. Degree of care required. — The degree of care which a telegraph company is bound to use may be called "ordinary,"¹ if we measure the meaning of that word solely by reference to the kind of care which a man of ordinary prudence would use in telegraphing for himself. But, as compared with almost any other kind of business, the care required of a telegrapher would be called "great care." The telegraph is employed for the plain purpose of securing the utmost speed. It is not commonly used for matters of trivial importance or such as will bear delay. The charge made for the service is much greater than the usual postage; showing that telegraph companies expect to render an unusual service, in consideration of an unusual fee. Messages are drawn up in a very condensed style, and with an effort to express much matter in few words. Any prudent man, employed to transmit or receive such a message, which he did not fully understand, but which

³ In *Rogers v. Western U. Tel. Co.* (78 Ind. 169), a Sunday telegram: "Come up in morning; bring all," being presumably a mere invitation, was held not a matter of necessity, the contract was void, and the penalty for failure to transmit could not be recovered. To the same effect, *Western U. Tel. Co. v. Hutcheson*, 91 Ga. 252; 18 S. E. 297; *Willingham v. Western U. Tel. Co.* 91 Ga. 449; 18 S. E. 298. In *Gulf, etc. R. Co. v. Levy* (59 Tex. 543), a telegram announcing a death and summoning to the writer's help, was held an act of necessity within the Sunday law, and the contract to send it not void. Where a company receives a message on Sunday for transmission, calling an attorney to appear in court on Monday morning, but does not deliver it until Monday evening, it is liable for the statutory penalty and damages, whether sending the message is a work of necessity

within the exception of the Sunday law or not (*Western U. Tel. Co. v. McLaurin*, 70 Miss. 26; 13 So. 36).

¹ "Ordinary" or "reasonable" care and diligence are the terms used in *Bliss v. Baltimore, etc. Tel. Co.*, 30 Mo. App. 103 [no less]; *Beasley v. Western U. Tel. Co.*, 39 Fed. 181 [no more]; *Western U. Tel. Co. v. De Jarles*, 8 Tex. Civ. App. 109; 27 S. W. 792. See *Western U. Tel. Co. v. Cunningham*, 99 Ala. 314; 14 So. 579; *Conyers v. Postal Tel. Co.*, 92 Ga. 619; 19 S. E. 253; *Western U. Tel. Co. v. Eskridge*, 7 Ind. App. 208; 33 N. E. 238. Gross negligence is not essential to plaintiff's recovery for delay in delivering a telegram (*Western U. Tel. Co. v. Broesche*, 72 Tex. 654; 10 S. W. 73). It is culpable negligence to keep an operator who does not know of the existence of an adjoining county town, it being a telegraph station (*Western U. Tel. Co. v. Buchanan*, 35 Ind. 430).

he knew was made out in his interest, would use extreme care in signaling or listening to it (as the case might be), and would be exceedingly prompt in forwarding it. That which he would do from choice, the telegraph company must do in the service of others, from a sense of duty ; and for the consequences of any failure to do so, it will be responsible. But when this degree of care has been used, the company is not responsible for mistakes which could not have been avoided by such care.²

§ 540. Duty as to receiving messages.—As we have already seen, it is the duty of a telegraph company to receive all lawful messages offered, for places on its line; and the same duty is generally imposed by statute as to places on the line of connecting companies. Irrespective of any statute, we think that this duty exists. It is not, however, the invariable duty of a company to keep all its offices continuously open and an operator present. That obligation depends upon the importance of the station.¹ It has a right to prescribe, within reasonable limits, the hours for doing business at its various offices, and is not bound to regulate all offices alike, nor to keep the operators at each informed of the hours for closing the others,² unless such hours are unreasonable. Nor is it always the duty of the operator, without being asked, to inform the sender of a message of the hour for closing the office addressed, although the closing may delay delivery till the next day,³ provided such closing hour is not unreasonable.⁴ But it is the duty of the company to inform all operators of obstructions to transmission as they arise, and the operators must warn senders of messages of these obstructions ; or their

² Cases cited in note 6, § 540*a*.

¹ At a small station, it is not the duty of the company to keep more than one operator ; and if a message was left with a messenger during the operator's absence, and was forwarded upon the operator's return, after a reasonable absence, the company is not guilty of negligence (*Behm v. Western U. Tel. Co.*, 8 Biss. C. C. 131).

² *Western U. Tel. Co. v. Harding*,

103 Ind. 505 ; 3 N. E. 172. This was an action for a statute penalty.

³ *Given v. Western U. Tel. Co.*, 24 Fed. 119 ; *Western U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444 ; 21 S. E. 835 ; *Western U. Tel. Co. v. Neel*, 86 Tex. 368 ; 25 S. W. 15. Compare *Western U. Tel. Co. v. Broesch*, 72 Tex. 654 ; 10 S. W. 734.

⁴ *Seemle*, *Western U. Tel. Co. v. Neel*, 86 Tex. 368 ; 25 S. W. 15.

existence, however caused, will be no excuse for delay.⁵ If there is a competing line, the company must send messages by that line, if it cannot by its own.⁶ A telegraph company may require messages to be reduced to writing before accepting them;⁷ and if the sender requests the company's operator to write out his message for him, the operator in so doing acts as the amanuensis and agent of the sender, and not as the agent of the company; and the company is not liable for an error thus made by their operator in acting for the sender and not for them.⁸ But if it accepts an unwritten message, it is bound to deliver it, like any other.⁹ This is a point of great importance, under the wide development of the telephone.

§ 540a. Duty as to delivery.—A message by telegraph must be delivered in writing, and not by word of mouth or by telephone;¹ and the small amount of business done at an office is no excuse for not having a messenger for this purpose.² Speed being the known object, a degree of diligence and promptness must be used, such as, in the delivery of ordinary letters, would be very high.³ The message should be delivered

⁵ *Pacific Cable Co. v. Fleischner*, 55 Fed. 738; *aff'd*, 66 Fed. 899; 14 C. C. A. 166; *Bierhaus v. Western U. Tel. Co.*, 8 Ind. App. 246; 34 N. E. 581 [storm, and broken wires].

⁶ *Pacific Cable Co. v. Fleischner*, 14 C. C. A. 166; 66 Fed. 899; *aff'd* 55 Fed. 738.

⁷ See *post*, § 546; *Western U. Tel. Co. v. Edsall*, 63 Tex. 668; *Western U. Tel. Co. v. Dozier*, 67 Miss. 288; 7 So. 325.

⁸ *Western U. Tel. Co. v. Edsall*, 63 Tex. 668.

⁹ Defendant, having received and transmitted the message, cannot excuse delay in delivering it by setting up that the message was not in writing, and that it was not bound to receive it (*Western U. Tel. Co. v. Wilson*, 93 Ala. 32; 9 So. 414; *Western U. Tel. Co. v. Jones*, 69 Miss. 658; 13 So. 471 [telephone]). *S. P., Texas Tel. Co. v. Seiders*, 9

Tex. Civ. App. 431; 29 S. W. 258. It has been held that an action will not lie either under the statute or at common law, for failure to transmit a verbal message, orally delivered to the operator, in the absence of evidence of a custom to that effect (*Western U. Tel. Co. v. Dozier*, 67 Miss. 288; 7 So. 325). But *query*?

¹ Delivery through a telephone not a compliance with contract (*Brashers v. Western U. Tel. Co.*, 45 Mo. App. 433).

² *Western U. Tel. Co. v. Henderson*, 89 Ala. 510; 7 So. 419.

³ *Western U. Tel. Co. v. Carter*, 2 Tex. Civ. App. 624; 20 S. W. 834; *Western U. Tel. Co. v. Clark* [Tex. Civ. App.], 25 S. W. 990; [twenty-nine hours' delay]. The fact that the message summoned a physician is equivalent to notice of need of haste (*Western U. Tel. Co. v. Pelzer*, *Tex. Civ. App.* ; 35 S. W. 836).

to the addressee in person or to some person of reasonable age in his family or service.⁴ Reasonable diligence to find the addressee is required,⁵ but no more.⁶ If, after using such dili-

For insufficient excuses, see *Western U. Tel. Co. v. Rosentreter*, 80 Tex. 406; 16 S. W. 25; *Western U. Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403; 25 S. W. 168, 1036; *Western U. Tel. Co. v. Merrill* [Tex. Civ. App.], 22 S. W. 836; *Western Union Tel. Co. v. Pruett*, 6 Tex. Civ. App. 533; 35 S. W. 78. The fact that a telegraph company fails to state to the sender that office hours at the station of delivery have expired does not bind it to transmit the message before the next morning (*Bateman v. Western U. Tel. Co.*, 97 Ga. 338; 22 S. E. 920). But to the contrary, see *Western U. Tel. Co. v. Bruner* [Tex. Sup.], 19 S. W. 149. As to Sunday messages, see *Western U. Tel. Co. v. Yopst*, 118 Ind. 248; 20 N. E. 222 [notice of necessity required]. A message received on Sunday is received, in the absence of a special contract, with the understanding that it is to be transmitted subject to such reasonable rules, as to office hours, as may have been established (*Western U. Tel. Co. v. McCoy*, Tex. Civ. App. ; 31 S. W. 210).

⁴ In the absense of the addressee, it was the duty of the company to deliver the message either to those in charge of his business house or to members of his family at his residence (*Western U. Tel. Co. v. Woods*, 56 Kans. 737; 44 Pac. 989). Delivery to one of two addressees is sufficient (*Western Union Tel. Co. v. Barnes*, 95 Tenn. 271; 32 S. W. 207). To prove delay, it must appear when the message was delivered to be transmitted, or at what time it was received at the delivery office (*Brumfield v. Western Union Tel. Co.*, Iowa, ; 66 N. W. 898).

⁵ *Western U. Tel. Co. v. Karr*, 5 Tex. Civ. App. 60; 24 S. W. 302. As to the duty of the company to make inquiry for the person to whom a message is addressed, if absent from the office or residence, see *Pope v. Western U. Tel. Co.*, 9 Ill. App. 283; 14 Id. 531; *Given v. Same*, 24 Fed. 119; *Western U. Tel. Co. v. Cooper*, 71 Tex. 507; 9 S. W. 598. In case of palpable mistake, diligence must be used to ascertain correct address (*Western U. Tel. Co. v. Houghton*, 82 Tex. 561; 17 S. W. 846).

⁶ A company which has received a message directed to one person in the care of another, and has tendered it to the latter, is under no obligation, on his refusing to receive the message, to find the addressee (*Western U. Tel. Co. v. Young*, 77 Tex. 245; 13 S. W. 985). Where an impostor telegraphed in the name of a third person, asking for money, and the receiver responded with a telegraphic money order addressed to such third person, at the place whence the request had been sent, which was not, however, the residence of the latter. Held, that the company's delivery of the money order to the impostor, having been made in good faith, was an excusable misdelivery (*Western U. Tel. Co. v. Meyer*, 61 Ala. 158), approved by Gray on Tel. with the suggestion that it was not even a misdelivery, and by Frederick Pollock in 1 Law Q. Rev. 497. The justice of the conclusion may be seen by considering the alternative, which would make it the duty of a telegraph company to identify the sender of every message, or ascertain the authenticity of the signature at its peril.

gence, the addressee cannot be found, the fact should be reported to the sender, to correct the error.⁷ If the error is due to the fault of the company, it is responsible for the consequences,⁸ and must correct it without charge; but not otherwise. When the address is beyond the reasonable delivery limits of the delivery office, and the fact is known to the receiving agent, he may require the reasonable cost of special delivery to be prepaid.⁹ If he makes no such demand, the message must be sent, leaving payment to be settled on or after delivery.¹⁰ If the fact is not originally known to the receiving agent, he should, upon learning it, promptly demand the extra payment from the sender, if the company is unwilling to take the risk of payment on delivery. If the fact is known to the sender and he purposely or negligently conceals it, on handing in his message, the delay resulting from his act must be at his own loss.¹¹

§ 541. Messages must not be altered. — The necessity of great condensation in the composition of telegrams makes it a duty peculiarly imperative upon every telegrapher to forward a message exactly as it is furnished to him. He is not responsible for the inability of the receiver to comprehend it, no matter how unintelligible it may be; but if any loss is sustained by either the sender or the receiver of the message, in consequence of the telegrapher's alteration of its terms from those in which it was originally written, he is responsible. He may refuse to take an illegible message,¹ and may demand any reasonable explanation for the purpose of assuring himself that he has read the message rightly; but no degree of good faith or good intention will justify him in adding to or detracting from the

⁷ *Sherrill v. Western U. Tel. Co.*, 116 N. C. 655; 21 S. E. 429.

⁸ When a dispatch was received an hour before closing time, and a mistake in the address was caused by negligence in transmission, failure to deliver it till next day cannot be excused on the theory of "reasonable office hours" (*Western U. Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403; 25 S. W. 1036).

⁹ See § 546, *post*, notes 6, 7 and 8.

¹⁰ *Western U. Tel. Co. v. Moore*, 12 Ind. App. 136; 39 N. E. 874; *Whittemore v. Western U. Tel. Co.*, 71 Fed. 651.

¹¹ See § 556a, *post*. A company is not bound to deliver a telegram three miles out of town, and beyond its delivery limits, at an extra expense to itself, or by special messenger (*Western U. Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310; 22 S. W. 532).

¹ See § 546, *post*.

precise words and syllables of the message.² He is not exonerated by the circumstance that it is written in cipher, provided the characters consist solely of English letters and figures.³ Where, however, the sender negligently writes a word so that it more nearly resembles another word, the company is not liable for transmitting the word as it appeared to be written.⁴

§ 542. Evidence of negligence. — The sound rule of evidence, which puts the burden of proof upon the party pre-

² The statement in the text as to the strict liability of telegraph companies for neglect in the transmission of messages is upheld in *Tyler v. Western U. Tel. Co.*, 60 Ill. 424; s. c., again, 74 Ill. 168. The case of *N. Y. & Washington Tel. Co. v. Dryburg* (35 Pa. St. 298) affords a very strong illustration of the rule. The telegraph company received a message calling for "eight hand bouquets." The writing not being very distinct, the operator mistook "hand" for "hund" (a mistake which the writing of many persons would fully justify); and, naturally enough, he thought that "hund" was a mistake for "hundred." He therefore telegraphed for "eight hundred bouquets," which were sent, involving, of course, a great loss. Held, that the company was liable for the damage. *S. P., Redington v. Pacific Cable Co.*, 107 Cal. 317; 40 Pac. 432 [mistake of "nine," for "nineteen," in a message directed to an officer, requiring him to levy on property to the amount of "nineteen hundred and three dollars"]. In *Pearsall v. Western U. Tel. Co.* (124 N. Y. 256; 26 N. E. 534; aff'g, 44 Hun, 533), T. W. P. sent a message to his firm "T. W. P. & Co." The words "& Co." being omitted, his partner did not open the telegram, and a loss of \$1,000 was incurred. Judgment for plaintiff affirmed. In *Western U. Tel. Co. v. Edsall* (63 Tex. 668), the message furnished

was: "Meet me immediately in two hours at Buffalo Springs. Bring Shep." As delivered, the last word was changed to "sheep," in consequence of which the person addressed, who was agent of the sender, drove a flock of 2,500 ranch sheep to meet his principal at the station instead of bringing the dog. The court expressed the opinion that, had not the company been exonerated by the fact that the dispatch was written by the operator, at the direction and with the approval of the sender, damage to the flock could have been recovered, if it were shown that they had been driven with due care. Where a company so changes a telegram in a material point in transmission that it contains incorrect information, it is liable to the sender for damages resulting therefrom (*Western Union Tel. Co. v. Kemp*, 44 Neb. 194; 62 N. W. 451). See s. c., again, 74 Tex. 329; 12 S. W. 41. See also *Beasley v. Western U. Tel. Co.*, 39 Fed. 181; *Western U. Tel. Co. v. Boots*, 10 Tex. Civ. App. 540; 31 S. W. 825 ["Booth" instead of "Boots"]; *Western U. Tel. Co. v. Reeves*, 8 Tex. Civ. App. 37; 27 S. W. 318 [name of addressee changed]; *Lee v. Western U. Tel. Co.*, 51 Mo. App. 375 ["all" for "till"].

³ *Western U. Tel. Co. v. Hyer*, 22 Fla. 637; 1 So. 129.

⁴ *Koons v. Western U. Tel. Co.*, 102 Pa. St. 164.

sumptively best acquainted with the facts, requires that, in an action against a telegraph company, upon its common-law liability, in the absence of any contract limiting that liability, proof that it received a message which it did not properly deliver, or which it delivered in a distorted form, should be deemed sufficient to raise a presumption of negligence on its part, and to cast upon it the burden of proving that it used due care and diligence in transmitting the message.¹ As a general rule, where an error is caused by atmospheric influences, or other causes beyond the control of the operators, they are aware at the time of the perturbation thus caused, and have it in their power to note the fact, as a precaution in case of future inquiries. They can tell with wonderful accuracy the place at which the wires are interfered with. They can and do keep the original message, and a copy of that which is received at the other end of the wire; and by a comparison of these, they can ascertain whether the error occurred in the electric transmission of the message. They have thus unusual facilities for disproving negligence, if they were not in fact negligent; and the plaintiff, who is wholly in the dark as to all these matters, ought not to be called upon for affirmative proof in respect to them. But the company is not confined to tracing the mistake to a cause in atmospheric or electric conditions. They may exonerate themselves by proof of due care or the absence of negligence and wrong on their part.² The possibly different rules

¹ All the cases support this rule (Pearsall v. Western U. Tel. Co., 44 Hun, 532; aff'd, 124 N. Y. 256; 26 N. E. 534 [alteration]; Rittenhouse v. Independent Tel. Co., 44 N. Y. 265; Western U. Tel. Co. v. Meek, 49 Ind. 53; Same v. Griswold, 37 Ohio St. 301; Same v. Edsall, 63 Tex. 668; Same v. Scircle, 103 Ind. 227; 2 N. E. R. 604; Same v. Richman [Penn.], 8 Atl. 171; Same v. Cook, 61 Fed. 624; Western U. Tel. Co. v. Crall, 38 Kans. 679; 17 Pac. 309; s. c., again, 39 Kans. 580; 18 Pac. 719 [alterations]; Sherrill v. Western U. Tel. Co., 116 N. C. 655; 21 S. E. 429 [non-delivery]; Harkness v. Western U. Tel. Co., 73 Iowa, 190; 34 N. W. 811 [delay]; Western U. Tel. Co. v. Smith, 88 Tex. 9; 28 S. W. 931; 30 Id. 549 [delay]). The dropping of an important word in the transmission of a telegram is *prima facie* evidence of negligence in the telegraph company (Ayer v. Western U. Tel. Co., 79 Me. 493; 10 Atl. 495; Pearsall v. Western U. Tel. Co., 124 N. Y. 256; 26 N. E. 534; Western U. Tel. Co. v. Short, 53 Ark. 434; 14 S. W. 649).

² Pinckney v. Western U. Tel. Co., 19 S. C. 71; 45 Am. Rep. 499 [a

of evidence, applicable in case of a message sent under stipulations limiting the liability of the company, will be considered in connection with the validity of such stipulations.

• **§ 543. To whom company is responsible.**—On the principle, well settled in the highest courts of New York and of many other states, that where two persons make a contract expressly for the benefit of a third person, such third person may sue upon it,¹ a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often suffer great damage without any means of redress. They could not recover from the senders of the messages, because the latter would not be in fault: and the senders could not recover from the companies any compensation for damage which they had not sustained. Thus, for example, if A. telegraphs to B. that he will sell goods at a certain price, and B. sends a telegram in reply, accepting the offer, which is never delivered, and A. having, consequently, sold the goods to another person, is compelled (as he would be²) to make good to B. any difference in price, it is clear that the loss happens through the fault of the telegraph company; yet B. cannot sue the company, though he sent the message, because all his rights were secured by that act; and unless A., to whom the message was addressed, can sue the company, which is the only party really in fault, it will escape all liability. The liability of a telegraph company for actual damages inflicted by its negligence on the addressee is generally recog-

cipher message]. For examples of evidence insufficient to excuse non-delivery or delay, see *Herron v. Western U. Tel. Co.*, 90 Iowa, 129; 57 N. W. 696; *Western U. Tel. Co. v. Howell*, 38 Kans. 685; 17 Pac. 313 [gross negligence]; *Western U. Tel. Co. v. Johnson*, 9 Tex. Civ. App. 48; 28 S. W. 124; *Western U. Tel. Co. v. Cook*, 9 C. C. A. 680; 61 Fed. 624 [incompetent operator]. For examples of evidence sufficient for this purpose, see *Smith v. West-*

ern U. Tel. Co., 57 Mo. App. 259. When it is a question for the jury, see *Thompson v. Western U. Tel. Co.*, 10 Tex. Civ. App. 120; 30 S. W. 250; *Western U. Tel. Co. v. Cooper*, 71 Tex. 507; 9 S. W. 598 [sufficiency of effort]; *Western U. Tel. Co. v. Eskridge*, 7 Ind. App. 208; 33 N. E. 238.

¹ *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 Id. 178; *Steman v. Harrison*, 42 Pa. St. 49.

² *Trevor v. Wood*, 36 N. Y. 307.

nized and enforced in the United States.³ But it is to be carefully observed that the contract must be *expressly* for the benefit of the addressee, to give him a right of action thereon, at common law. Either the message must show upon its face that it is for the benefit of the addressee, or the telegrapher must be otherwise notified of the fact.⁴ Still less can one,

³ *Young v. Western U. Tel. Co.*, 107 N. C. 370; 11 S. E. 1044 [delay]; *Sherrill v. Western U. Tel. Co.*, 109 N. C. 527; 14 S. E. 94 [failure to deliver]; *Mentzer v. Western U. Tel. Co.*, 93 Iowa, 752; 62 N. W. 1 [delay]; *Wolfskehl v. Western U. Tel. Co.*, 46 Hun, 542 [omission]; *Internat. Ocean Tel. Co. v. Saunders*, 32 Fla. 434; 14 So. 148; *Aiken v. Telegraph Co.*, 5 S. C. 358; *So Relle v. Western U. Tel. Co.*, 55 Tex. 308; *Gulf, etc. R. Co. v. Levy*, 59 Id. 542, 563; *Western U. Tel. Co. v. Jones*, 81 Id. 271; 16 S. W. 1006; *Western U. Tel. Co. v. Coffin*, 88 Tex. 94; 30 S. W. 896; *Western U. Tel. Co. v. Cunningham*, 99 Ala. 314; 14 So. 579 [reply message]; *Western U. Tel. Co. v. Longwill*, 5 N. M. 308; 21 Pac. 339. The same result was reached in other cases (*Strause v. Western U. Tel. Co.*, 8 Bliss C. C. 104; *Western U. Tel. Co. v. Dubois*, 128 Ill. 248; 21 N. E. 4), by putting the recovery on the ground of tort. The English decisions to the contrary (*Dickson v. Reuter's Tel. Co.*, L. R. 2 C. P. D. 62; *aff'd*, 3 C. P. D. 1 [message delivered to wrong person, and acted on by him]; *Playford v. United K. Tel. Co.*, L. R. 4 Q. B. 706 [error in message as delivered]; followed in *Feaver v. Montreal Tel. Co.*, 23 Upper Canada [C. P.], 130; see also 24 Id. 258) are not followed in the United States; and they are now disapproved by English jurists (see 1 Law Quarterly Rev. 498: N. Y. and Washington Tel. Co. v. Dryburg, 35 Pa. St. 298). In *Aiken v.*

Western U. Tel. Co. (69 Iowa, 31; 28 N. W. 419), and in *Dougherty v. American U. Tel. Co.* (75 Ala. 179; s. c. again, 89 Ala. 191; 7 So. 660), it was held that where the addressee was the principal, and the sender his agent, the addressee could recover, there being here plainly a privity of contract. But it is held that the addressee cannot recover without proof of actual damages (*First Nat. Bank v. Western U. Tel. Co.*, 30 Ohio St. 555). Very clearly, the company is liable to an addressee, to whom it has promised to deliver an expected telegram (*Milliken v. Western U. Tel. Co.*, 110 N. Y. 403; 18 N. E. 251; *Western U. Tel. Co. v. Evans*, 5 Tex. Civ. App. 55; 23 S. W. 998). The company remains liable, though the compensation for transmitting was paid by sender, and was afterwards returned to him by company (*Western U. Tel. Co. v. Beringer*, 84 Tex. 38; 19 S. W. 336; *West v. Western U. Tel. Co.*, 39 Kans. 93; 17 Pac. 807). The rights of the addressee must be determined by the contract made by the sender of the message with the telegraph company (*Russell v. Western U. Tel. Co.*, 57 Kans. 230; 45 Pac. 598).

⁴ *Western U. Tel. Co. v. Wood*, 6 C. C. A. 432; 57 Fed. 471; *Elliott v. Western U. Tel. Co.*, 75 Tex. 18; 12 S. W. 954; *Western U. Tel. Co. v. Fore*, Tex. Civ. App. ; 26 S. W. 783; *Butner v. Western U. Tel. Co.*, 2 Okl. 234; 37 Pac. 1087.

who neither sends the message nor is addressed by it, sue upon the contract, in the absence of notice to the telegrapher of his interest in the message.⁵ It is settled law in America that a telegraph company is responsible to the receiver of a message for any *misfeasance* by which he is injured, such, for example, as the alteration of a message,⁶ or the sending a forged signature, or message, without proper inquiry.⁷ Telegraph companies are in some states made liable to addressees by statute for any default, irrespective of these limitations.⁸

⁵ Where a telegram does not show that it concerns the business of the addressee's employer, further than that it is addressed in the latter's care, the right of action for damages for negligent transmission is in the addressee, not in the employer (*Lee v. Western U. Tel. Co.*, 51 Mo. App. 375). Where one orders goods of a country merchant, who, acting as a merchant and not as agent, telegraphs for the goods, there is no privity of contract between the customer and the telegraph company so as to make it liable to him for a misdelivery of the dispatch (*Deslottes v. Baltimore, etc. Tel. Co.*, 40 La. Ann. 183; 3 So. 566).

⁶ *N. Y. & Washington Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Seiler v. Western U. Tel. Co.*, 3 Am. Law Rev. 777.

⁷ *Elwood v. Western U. Tel. Co.*, 45 N. Y. 549. There the company forwarded a forged dispatch, upon the faith of which the plaintiffs advanced \$10,000. Held, that the company was liable for this amount. *s. p.*, *Strause v. Western U. Tel. Co.*, 8 Biss. 104. *Rose v. U. S. Tel. Co.*, 3 Abb. N. S. 408; 34 How. Pr. 308, is overruled.

⁸ *Western U. Tel. Co. v. McKibben*, 114 Ind. 511; 14 N. E. 894; *Markel v. Western U. Tel. Co.*, 19 Mo. App. 80; *Herron v. Western U. Tel. Co.*, 90 Iowa, 129; 57 N. W. 696. Under

the Tennessee Code, § 1542, the company is liable for delay to the person who, upon the face of the message, appears to be the beneficiary, though no contractual relation existed (*Western U. Tel. Co. v. Mellon*, 96 Tenn. 66; 33 S. W. 725). In an action by the receiver of a message, for failure to deliver it promptly, the complaint alleged that defendant was engaged in the business of transmitting messages by telegraph between named points; that the sender, as the agent of the receiver, delivered the message in question to defendant, and paid therefor; that defendant transmitted the message to its destination, but failed to deliver it to plaintiff until next day. Held, that these allegations imported an acceptance of the message by defendant, and the complaint sufficiently showed a contract entered into between plaintiff, by his agent, the sender, and defendant (*Western U. Tel. Co. v. Wilson*, 93 Ala. 32; 9 So. 414). Mere delivery of a message written on a leaf torn from a blank-book, without any word spoken either by the plaintiff's messenger or the company's operator concerning the sending of the message, and an absence of any payment made or tendered of the price for transmission, is insufficient to create a liability against the company for failure to send such message (*Western U. Tel. Co. v. Liddell*, 68 Miss. 1; 8 So. 510).

§ 544. **Connecting lines.**—In determining the liability of one of several connecting companies in respect of a message received by one to be transmitted over the connected line, resort is to be had to the principles applied to the similar question in the law of carriers; and this is not uniform in the various states. The general American rule is that the act of a carrier, in receiving goods directed to a place beyond his route, does not imply anything more than an agreement to transport them over his own line and deliver them to a proper carrier for transportation the rest of the way.¹ Hence (except in those few states where, on the contrary, a contract to deliver at the ultimate address is held to be implied), the company actually in fault is liable to the injured party, although he had no direct dealings with it,² while the presumption is against the liability of the telegraph company first receiving the message for the negligence of connecting lines. If, however, that company agrees to transmit the message to its final destination, it is liable for the negligence of all connecting lines.³ Receipt of

Where an operator accepts a message for transmission, the fact that there is no office at the place to which it is to be sent, does not relieve the company from its liability for failure to transmit and deliver (*Western U. Tel. Co. v. Jones*, 69 Miss. 658; 13 So. 471).

¹ *Root v. Great Western R. Co.*, 45 N. Y. 524; *Nutting v. Conn. River R. Co.*, 1 Gray, 502; *Hood v. New Haven R. Co.*, 22 Conn. 1; *Farmers', etc. Bank v. Champlain Tr. Co.*, 23 Vt. 186.

² *Leonard v. N. Y., Albany, etc. Tel. Co.*, 41 N. Y. 544; *Baldwin v. U. S. Tel. Co.*, 1 Lans. 125. See s. c., on demurrer, 54 Barb. 505; 6 Abb. N. S. 405; and on appeal, 45 N. Y. 744. In the former case, the defendant had no real interest in contesting this point, having indemnified the company in fault, and took no pains to change the decision in this particular. The second telegraph company was also held liable in *Smith v. Western U. Tel.*

Co., 84 Tex. 359; 19 S. W. 441; *Western U. Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460; 22 S. W. 656; *Martin v. Western U. Tel. Co.*, 1 Tex. Civ. App. 143; 20 S. W. 860.

³ *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458. Action by a grain-dealer on account of an incorrect report of the price of wheat at Chicago under a contract with the defendant to furnish daily reports of the market. The defendant reported the price at \$1.21 instead of \$1.56, which was the true price. Defendant's line did not extend to Chicago; but at Grinnell it connected with another line reaching to that city, from which the market reports were obtained; held, that burden lay upon defendant to show that the report received by it at Grinnell was incorrect. Plaintiff recovered. The decision in *Sweatland v. Illinois, etc. Tel. Co.* (27 Iowa, 435), that the burden of proving negligence is upon defendant, was distinguished, on the ground that the contract sued on in that

payment in advance for the entire service is evidence of such an agreement.⁴ The subject might be pursued much further; but as it belongs to the law of carriers, rather than to that of telegraphs, we refer our readers to treatises on the former law.⁵

§ 545. Power to make regulations.—The power of a telegraph corporation, whether implied by the grant of a charter, or expressed in the statute itself, to make regulations for the conduct of its business, does not enable it to shield itself from liability to others by regulations which are not reasonable.¹ It owes a duty of service to the public which it cannot thus evade. It has general power to make such reasonable regulations for the transaction of its business as the nature of the business justifies; and its regulations for this purpose, so far as held reasonable by the courts, may afford ground for exempting it from liability or qualifying the extent of that liability, in case of non-compliance therewith. But a mere

case restricted the defendant's liability.

⁴De Rutte v. N. Y., Albany, etc. Tel. Co., 1 Daly, 547; Western U. Tel. Co. v. Shumate, 2 Tex. Civ. App. 429; 21 S. W. 109. An adverse decision in Canada (Stevenson v. Montreal Tel. Co., 16 U. C. [Q. B.] 530), was based upon a judgment of the Exchequer Chamber in Collins v. Bristol, etc. R. Co. (1 Hurlst. & N. 517), which was reversed upon this very point by the House of Lords (7 H. L. Cas. 194; 5 Hurlst. & N. [Am. ed.] 969). The courts in Canada would doubtless now feel bound to follow the House of Lords.

⁵ See cases in which liability for connecting lines was stipulated against: Conrad v. Western U. Tel. Co., 162 Pa. St. 204; 29 Atl. 888; Western U. Tel. Co. v. Munford, 3 Pickle, 190; 10 S. W. 318.

¹ Fowler v. Western U. Tel. Co., 80 Me. 381; 15 Atl. 29; Ellis v. American Tel. Co., 13 Allen, 226; Marvin v. Western U. Tel. Co., 15 Chic. Legal News, 416; Western U.

Tel. Co. v. Moore, 12 Ind. App. 136; 39 N. E. 874; Brown v. Western U. Tel. Co., 6 Utah, 219; 21 Pac. 988 [Sunday closing]. The general principle, that rules must be reasonable, is clearly implied in all the cases hereafter cited, especially in Primrose v. Western U. Tel. Co., 154 U. S. 1; 14 S. Ct. 1098. In U. S. Tel. Co. v. Gildersleve (29 Md. 232), held that the company could not, by its rules, avoid liability for gross negligence, such as an entire failure to transmit a message. See Sweatland v. Illinois, etc. Tel. Co., 27 Iowa, 433. The same ruling has often been made in unreported cases. On a trial in 1887, the singular fact was developed that few of these "rules," so often relied upon as defenses, have ever been actually adopted by the telegraph company which transacts nine-tenths of the business in America; and they were therefore excluded (Pearsall v. Western U. Tel. Co., 44 Hun, 532; aff'd, 124 N. Y. 256; 26 N. E. 534).

rule or regulation, declaring that the company will not be liable for damages in certain cases, where at common law or by statute it is liable, is not, in our judgment, a "rule or regulation" at all, and should be treated as void.

§ 546. **Certain reasonable rules considered.** — Among the common regulations of telegraph companies which we consider reasonable, are those which require all messages to be in Roman letters, legibly written, without abbreviations or figures, to contain the full and precise address of the person intended to receive the message, and either to be signed with the name of the sender or indorsed therewith. We think, too, that in general a written acknowledgment from the receiver of the message may be required as a condition of delivery. The company has no right to lay down a rule absolutely excluding all messages not in the English language, or not intelligible to the operator;¹ but a rule, prescribing a moderate extra charge for messages in cipher, or in a foreign language, would be perfectly reasonable.² And a rule, requiring a stipulation that the company will not be liable for errors in cipher or obscure messages, and that no employee is authorized to vary this restriction, is not unreasonable or against public policy.³ Roman letters may be properly required; because telegraphers usually have no other alphabet in use, and cannot justly be expected or required to have any other.⁴ Regulations requiring prepayment of messages and answers are not unreasonable.⁵

¹ In *Western U. Tel. Co. v. Reynolds* (77 Va. 173), it was held that the company could not justify wholly neglecting to transmit a message, by showing that it was in cipher and unintelligible.

² See cipher telegrams, liability of company for errors and for non-delivery, and measure of damages, discussed, by Seymour D. Thompson (33 Cent. Law J. 147).

³ *Primrose v. Western U. Tel. Co.*, 154 U. S. 1; 14 S. Ct. 1098.

⁴ See remarks of Woodward, J., upon this point, in *N. Y. & Washington Tel. Co. v. Dryburg*, 35 Pa. St. 298.

⁵ Prepayment of messages may obviously be required, in accordance with the rule as to common carriers (see § 488, *ante*); and it is so held (*Western U. Tel. Co. v. Liddell*, 68 Miss. 1; 8 So. 510). But it is waived by acceptance of the message for transmission, without requiring payment, especially where the agent declined to receive compensation, and requested that the person to whom the message was sent be allowed to pay (*Western U. Tel. Co. v. Yopst*, 118 Ind. 248; 20 N. E. 222). Prepayment of answers may be required (*Western U. Tel. Co. v. McGuire*, 104 Ind. 130; followed, with some hesi-

Regulations may be made requiring a reasonable deposit for the prompt delivery of a message beyond a reasonable distance from the station;⁶ but such demands must be confined within such limits as the courts deem reasonable;⁷ and they can only be enforced in a reasonable manner.⁸ Reasonable office-hours may be prescribed, outside of which messages will not be received or delivered.⁹ The company may require all messages to be handed in at one of its offices, and refuse to be responsible for messages handed to its servants outside, when not authorized to receive them.¹⁰ But it cannot relieve itself, by any rule, from responsibility for a servant, sent by it to receive a message anywhere.¹¹

§ 547. Certain unreasonable rules considered. — Among the rules which we consider highly unreasonable and unjust (if it is to be regarded as a "rule" at all), is one which it has become usual for telegraph companies to make, exempting themselves from all liability for the non-delivery of unrepeatd messages, and from any greater liability, in respect to repeated messages, than for the mere repayment of the money paid for transmission. This rule, if valid, enables a telegraph company

tation as to the grounds of the decision, in *Hewlett v. Western U. Tel. Co.*, 28 Fed. 181).

⁶ *Western U. Tel. Co. v. Henderson*, 89 Ala. 510; 7 So. 419; *Whittemore v. Western U. Tel. Co.*, 71 Fed. 651. A rule limiting free delivery in a town of 5,000 inhabitants to one-half mile from its office is reasonable (*Western U. Tel. Co. v. Trotter*, 55 Ill. App. 659).

⁷ A regulation requiring the sender of a telegram to pay in advance charges for the delivery of the message in case the addressee lives beyond its free-delivery limits, whether the sender knows the distance of the addressee's residence from the station or not, is unreasonable and invalid (*Western U. Tel. Co. v. Moore*, 12 Ind. App. 136; 39 N. E. 874).

⁸ *Western U. Tel. Co. v. Womack* (9 Tex. Civ. App. 607; 29 S. W. 932;

Western U. Tel. Co. v. Teague, 8 Tex. Civ. App. 444; 27 S. W. 958.

⁹ *Western U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444; 21 S. E. 835; *Western U. Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394; 25 S. W. 439 [sender knew the hours]; *Western U. Tel. Co. v. May*, 8 Tex. Civ. App. 176; 27 S. W. 760 [sender did not know].

¹⁰ *Stamey v. Western U. Tel. Co.*, 92 Ga. 613; 18 S. E. 1008. See, for this principle, *Cronkite v. Wells* (32 N. Y. 247), holding that an express company's clerk cannot bind the company by receiving packages at any other place than its office.

¹¹ A regulation that its messenger boy, sent to receive a telegram for transmission, shall be deemed the agent of the sender, is invalid (*Will v. Postal Cable Co.*, 3 N. Y. App. Div. 22; 37 N. Y. Supp. 933).

to exercise its own pleasure about the delivery of a message, with absolute impunity. For, not content with the old form of their rules, which exempted the companies from liability for errors and delays, they have extended their freedom from liability to every case of the non-delivery of a message, so that the public have not, if these rules and contracts are valid, the slightest guaranty for so much as an effort to put messages in the course of transmission,¹ or to attend to their reception when transmitted. And although the absolute freedom from liability thus provided for extends only to unrepeatd messages, yet the repetition of a message has not the slightest tendency to secure its safe delivery after it has been reduced to writing at the further end of the line. If, then, the company may exempt itself from all liability for non-delivery under those circumstances, on the ground that the message was not repeated once, it can as well refuse to pay damages unless the message is repeated five hundred times. Besides, such a regulation deprives the sender of all real relief unless he enters into a special contract of insurance (at rates which are purposely made so exorbitant, that no one ever insures); and this, too, when the sender does not want absolute insurance, but only wants security for the use of reasonable care and diligence. Such rules have repeatedly been held void;² and, being illegal in their terms and plain import, they ought not to be given effect, even in those cases which might lawfully be provided for, and which are covered by their terms. An agreement to cut off a man's head would not be enforced, even so far as it included cutting off his hair; and no more should these rules, which aim at the nullification of the law, be partially enforced in cases where they will not have the full effect

¹ It has been held that such a rule is not to be interpreted so as to have this effect (*Birney v. N. Y. & Washington Tel. Co.*, 18 Md. 331); but rules could easily be devised which would secure this result.

² So held, under the Indiana statute (*Western U. Tel. Co. v. Meek*, 49 Ind. 53). So held, at common law, in Wisconsin (*Candee v. Western U. Tel. Co.*, 34 Wisc. 471; *Hib-*

bard v. W. U. Tel. Co., 33 Wisc. 558 [night message, half rates]; message never delivered, and non-delivery not excused]; in Maine (*True v. International Tel. Co.*, 60 Me. 9; *Bartlett v. Western U. Tel. Co.*, 62 Me. 209 [night message, half rates]); in Vermont (*Gillis v. Western U. Tel. Co.*, 61 Vt. 461; 17 Atl. 736); in Kentucky (*Smith v. Western U. Tel. Co.*, 83 Ky. 104).

that was contemplated.³ On the same footing stands the more ingenious "rule" by which companies have latterly required that all messages should be written upon a paper containing an express assent to the foregoing conditions. We believe that no court has ever held or ever will hold a telegraph company justified in refusing a message written upon a blank paper, or accompanied by an express refusal to submit to any conditions not imposed by law. It may be taken as settled law that a message, written upon a paper not containing such assent, and accepted by the company, is not in any way affected by such a rule.⁴ A telegraph company cannot excuse itself from liability for delay or failure, caused by a strike of its employees,⁵ and it is not justified, under such an emergency, in requiring, as a condition of receiving a message, that it be stamped "subject to delay."⁶

§ 548. **Notice of rules necessary.** — It was once said, by a judge of the highest court in Maryland, that every person dealing with a telegraph company is bound to know its rules, and is bound by them, whether he has any notice of them or not, and whether the company has published them or not.¹ This ruling was wholly unnecessary to the decision of the cases in which it was made; and it will therefore, we trust, be repudiated even in Maryland, if the question should ever fairly arise there. But whatever may be its treatment in Maryland, we cannot doubt that a doctrine, so utterly unlike anything which has passed under the name of justice between man and

³ There is nothing in any of the decisions necessarily inconsistent with these views; although it must be admitted that some courts have leaned the other way. *McAndrew v. Electric Tel. Co.* (17 C. B. 3), and *Breese v. United States Tel. Co.* (45 Barb. 274; 48 N. Y. 132), were both cases arising on express contracts; and in both the contracts only stipulated for exemption from liability for "errors and delays," a phrase very different from "non-delivery from whatever cause." In both cases the messages were delivered, and the errors were strictly telegraphic.

⁴ *Pearsall v. Western U. Tel. Co.*, 124 N. Y. 256; 26 N. E. 534; *aff'g*, 44 Hun, 532.

⁵ This is well settled, as to carriers of goods (*Blackstock v. Erie R. Co.*, 20 N. Y. 48), and indeed as to principals generally (see *ante*, § 146).

⁶ *Marvin v. Western U. Tel. Co.*, 15 Chic. Leg. N. 416.

¹ *Birney v. N. Y. & Washington Tel. Co.*, 18 Md. 331. See *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232, and *Western U. Tel. Co. v. Carew*, 15 Mich. 525.

man in any age, will not be entertained by the courts of any other state. We cannot pay it the respect of a formal refutation. The moral sense must be weakened by giving even sober consideration to such a proposition.

§ 549. **Customer must actually know the rule.** — We leave the last section unchanged, in substance, because, although it was written nearly thirty years ago, and is not needed any longer, it has served a useful purpose in helping to make further rulings of the same class impossible. Not even a Maryland court has since affirmed the doctrine above criticised; and the course of decisions is overwhelmingly against it. It may be taken as settled law, throughout the United States, that no amount of notice given to the public, by a telegraph company, of its requirement that messages shall be repeated or insured, or anything of that kind, in order to make it liable in damages, will have any effect upon the rights of a person dealing with such company, who did not in fact know of the rule.¹ And it makes no difference that such person had notices of this kind in his possession or constantly under his eyes, if he did not in fact read them.² Nor does it make any difference that he was a stockholder in the company. Stockholders are not chargeable with notice of all the company's rules and regulations.³

§ 550. **Limitation of liability by mere notice.** — The well-settled principles of the law of carriers in this country, resting

¹ *Pearsall v. Western U. Tel. Co.*, 124 N. Y. 256; 26 N. E. 534; aff'g 44 Hun, 532. In *Clement v. Western U. Tel. Co.* (137 Mass. 463), a contract limiting liability was held to be established, upon evidence that the sender had been accustomed to use printed forms containing such a contract; although the message in that case had not been written upon one. This ruling seems to us ill-considered and altogether erroneous. It was overruled in the *Pearsall* case, *supra*. The New York decision has been followed and applied in numerous cases; for example: *Western U. Tel. Co. v. Cunningham*, 99 Ala. 314;

14 So. 579 [rule requiring prepayment]; *Western U. Tel. Co. v. O'Keefe*, Tex. Civ. App. ; 29 S. W. 1137 [deposit for extra charges]; *Brashears v. Western U. Tel. Co.*, 45 Mo. App. 433 [same]; *Bierhaus v. Western U. Tel. Co.*, 8 Ind. App. 246; 34 N. E. 581 [limit to delivery hours]; *Western U. Tel. Co. v. Neel*, Tex. Civ. App. ; 25 S. W. 661 [same]; *Beasley v. Western U. Tel. Co.*, 39 Fed. 181 [requirement of stipulations].

² *Pearsall v. Western U. Tel. Co.*, *supra*.

³ *Id.*

upon their public duty, forbid that telegraph companies, as common carriers of messages, should have power to restrict their duties or liabilities by a mere notice,¹ unless there is sufficient evidence of the assent of their customers thereto to create a contract between them. It was once held, in Kentucky, that a telegraph company could restrict its liability, to a reasonable extent, by establishing a rule to that effect, and giving notice thereof to every customer.² And such was clearly the opinion of the Court of Common Pleas in England; although the question was not before it, a special contract having been made in accordance with the rule.³ It was natural that such a view should prevail in England; because the English courts allowed common carriers to do the same thing. But the Kentucky decision has been overruled in that state;⁴ and we do not believe that these opinions will be followed in America.

§ 551. Limitation of liability by contract.—The only remaining method, and, in our opinion, the *only* method by which the liabilities of a telegraph company can be restricted, is by special contract between the company and its customer. But to make such a contract valid, it must have not only the consent of the parties, but also a consideration. The mere undertaking of the carrier to perform his ordinary service for his ordinary compensation is no consideration for a contract restricting his liability, since he neither does nor promises anything more than he was bound to do without any such stipu-

¹ Although in England carriers were allowed to limit their liabilities by public notice, yet in most of the states of our Union, and in the Federal courts, this power has been denied to them (*Cole v. Goodwin*, 19 Wend. 251; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Falvey v. Northern Transp. Co.*, 15 Wisc. 129; *Steele v. Townsend*, 37 Ala. 247; *Edwards v. Cahawba*, 14 La. Ann. 220. See *Kimball v. Rutland, etc. R. Co.*, 26 Vt. 247;

Farmers', etc. Bank v. Champlain Trans. Co., 23 Id. 186; *Camden, etc. R. Co. v. Baldauf*, 16 Pa. St. 67; *Swindler v. Hilliard*, 2 Rich. Law, 286; *Reno v. Hogan*, 12 B. Monr. 63; *Barney v. Prentiss*, 4 Harr. & J. 317; *Railroad Co. v. Lockwood*, 17 Wall. 357).

² *Camp v. Western Union Tel. Co.*, 1 Metc. [Ky.] 164.

³ *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3.

⁴ *Smith v. Western U. Tel. Co.*, 83 Ky. 104.

lation. There must be some abatement from his regular charge in order to give vitality to the special contract.¹

§ 552. Proof of special contract. — A special contract is sufficiently proved by the production of a paper, printed or written, embodying the contract, and signed by the sender of the message.¹ It is not necessary to prove, in addition, that he read the paper before signing it. That is a matter of defense. And even if he did not read the paper, that fact alone is not enough to relieve him from responsibility for its contents. In the absence of good reason for not reading it, he is bound by its terms to the same extent as if he had read it.² But, if the type used is so fine that he could not readily read it, that is sufficient excuse for not doing so, especially if the light in which he signs the paper is poor.³ Whether a mere notice, limiting liability, printed at the head of the paper upon which a message, signed by the sender, is written, is sufficiently assented to by such signature to make it binding as a contract, is a question upon which opinions might well differ. But it appears to be generally held that it is.⁴ A message may be written upon any paper, without any contract upon it. The company is bound to transmit such a message;⁵ and cannot

¹ See *Smith v. N. Y. Central R. U. Tel. Co.*, 109 N. Y. 231; 16 N. Co., 24 N. Y. 222; *Bissell v. N. Y. E.* 75. *Central R. Co.*, 25 Id. 442; *Railroad Co. v. Lockwood*, 17 Wall. 357.

² *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; *Western U. Tel. Co. v. Edsall*, 63 Tex. 668.

³ *Breese v. U. S. Tel. Co.*, 48 N. Y. 132. Where a message is written by the sender on a blank, having on its face brief and clear notices that the message is to be sent subject to terms printed on the back, such terms, so far as not inconsistent with law, form part of the contract between him and the company, although he testifies that he does not remember reading them (*Primrose v. Western U. Tel. Co.*, 154 U. S. 1; 14 S. Ct. 1098; *Stamey v. Western U. Tel. Co.*, 92 Ga. 613; 18 S. E. 1008). To same effect, *Kiley v. Western*

Breese v. U. S. Tel. Co., 48 N. Y. 132, 142. This is the rule as to carriers (*Blossom v. Dodd*, 43 Id. 264). ⁴ *Wann v. Western U. Tel. Co.*, 37 Mo. 472.

⁵ The fact that the message was written on an ordinary piece of paper, instead of on a telegraph blank, does not relieve the company of its obligation to transmit (*Western U. Tel. Co. v. Jones*, 69 Miss. 658; 13 So. 471). Testimony is admissible to show that the word "Day," written across the printed stipulations on a blank form used for night messages was intended to cancel the stipulations so far as applicable to night messages (*Western U. Tel. Co. v. Piner*, 9 Tex. Civ. App. 152; 29 S. W. 66).

change its effect by fastening it to a printed form, with a special contract, without authority from the sender.⁶ A message, thus sent is not subject to any implied contract, limiting liability, even if the sender has been accustomed to use the usual printed forms.⁷

§ 553. Validity of contracts exempting from liability generally.—Even an express contract should not, and, generally speaking, does not, entirely exempt a telegraph company from liability. The rule in this respect varies, in different states; and it ought so to vary, so long as the courts differ in opinion as to the validity of similar contracts, when made by common carriers. Those courts which hold such contracts, when made by common carriers, valid to a certain extent, ought to sustain similar contracts in favor of telegraph companies; and the other courts should hold the reverse. The principle of public policy is precisely the same in each case. Accordingly, in the courts of Alabama, Arkansas, Georgia, Indiana, Iowa, Kentucky, Maine, Ohio, North and South Carolina, Tennessee, Utah, Vermont, and doubtless other states, even an express contract will not suffice to relieve a telegraph company from any part of its liability for its agents'

⁶ *Anderson v. Western U. Tel. Co.*, 84 Tex. 17; 19 S. W. 285. In an action for delay in the transmission of a telegram not written on one of the company's printed blanks, not attached thereto with the sender's knowledge or consent, evidence is not admissible to show a regulation by the company requiring all messages presented to it to be attached to one of its printed blanks (*Western U. Tel. Co. v. Arwine*, 3 Tex. Civ. App. 156; 22 S. W. 105). One who delivered a message written on a plain piece of paper to the company's agent, away from the office, held not bound by printed conditions subsequently attached exempting the company from liability until messages were presented to and accepted at one of its transmitting

offices (*Western U. Tel. Co. v. Pruett*, 6 Tex. Civ. App. 533; 35 S. W. 78).

⁷ *Pearsall v. Western U. Tel. Co.*, 124 N. Y. 256; 26 N. E. 534; *aff'd*, 44 Hun, 532; overruling *Clement v. Western U. Tel. Co.*, 137 Mass. 463. Where oral messages are taken, under a written general contract, providing for the use of the usual forms, it is for the jury to say whether the telegraph company by dispensing with the use of its blanks in its transactions, intended to relieve from the stipulations printed thereon (*Western U. Tel. Co. v. Stevenson*, 128 Pa. St. 442; 18 Atl. 441). Messages are now received over the telephone under contracts expressly providing that they shall be subject to the usual stipulations.

negligence in sending even an unrepeatd message.¹ The reasons for thus restricting the power of these companies to relieve themselves from liability, even by contract, are very plain. They have a practical monopoly of the business, secured to them by the grant of rights of eminent domain and by the impossibility of individual competition. The public are not really free agents in dealing with them. These special contracts are in reality extorted from the senders of messages. Although there is actually no rule of the Western Union Company, for example, requiring all messages to be written upon its printed forms, any one who regularly tries to send messages on blank paper will find himself obstructed and annoyed by the operators, in pursuance of secret instructions. Nevertheless, the Federal courts, and the courts of Great Britain, New York, Massachusetts, Michigan, Missouri and Texas, recognize the validity of contracts exempting a company from liability for unintentional mistakes or delays, when a message is not repeated.² But, even in such cases, the con-

¹ A telegraph company cannot, by contract, restrict its liability for negligent transmission to repeated messages (*Western U. Tel. Co. v. Crawford*, 110 Ala. 460; 20 So. 111; *American U. Tel. Co. v. Daughtery*, 89 Ala. 191; 7 So. 660; *Western U. Tel. Co. v. Short*, 53 Ark. 435; 14 S. W. 649; *Western U. Tel. Co. v. Blanchard*, 68 Ga. 299; *Western U. Tel. Co. v. Fontaine*, 58 Id. 433; *Western U. Tel. Co. v. Fenton*, 52 Ind. 1; *Western U. Tel. Co. v. Adams*, 87 Id. 598; *Manville v. Western U. Tel. Co.*, 37 Iowa, 214; *Harkness v. Western U. Tel. Co.*, 73 Id. 190; 34 N. W. 811; *Smith v. Western U. Tel. Co.*, 83 Ky. 104; *Ayer v. Western U. Tel. Co.*, 79 Me. 493; *Telegraph Co. v. Griswold*, 37 Ohio St 301; *Thompson v. Western U. Tel. Co.*, 107 N. C. 449; 12 S. E. 427; *Brown v. Postal Cable Co.*, 111 N. C. 187; 16 S. E. 179; *Sherrill v. Western U. Tel. Co.*, 116 N. C. 655; 21 S. E. 429; *Aiken v. Tel. Co.*, 5 S. C. 358; *Pepper v. Western U. Tel. Co.*, 3 Pickle, 554; 11 S. W. 783; *Marr v. Same*, 85 Tenn. 529; 3 S. W. 490; *Wertz v. Western U. Tel. Co.*, 7 Utah, 446; 8 Id. 499; 27 Pac. 172; *Gillis v. Western U. Tel. Co.*, 61 Vt. 461; 17 Atl. 736). In Nebraska, all these stipulations were made void by statute (*Kemp v. Western U. Tel. Co.*, 28 Neb. 661; 44 N. W. 1064; *Western U. Tel. Co. v. Lowrey*, 32 Neb. 732; 49 N. W. 707).

² *Primrose v. Western U. Tel. Co.*, 154 U. S. 1; 14 S. Ct. 1098; *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; 45 Barb. 274; *Kiley v. Western U. Tel. Co.*, 109 N. Y. 231; 16 N. E. 75; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *Birkett v. Western U. Tel. Co.*, 103 Id. 361; 61 N. W. 645; *Wann v. Western U. Tel. Co.*, 37 Mo. 472; *Cowen Lumber Co. v. Western U. Tel. Co.*, 58 Mo. App. 257; *Western U. Tel. Co. v. Hearn*,

tract would not be construed to exempt companies from liability for an error which would not have been probably obviated by repetition.³ And they are nowhere allowed to exempt themselves from liability for gross or willful neglect.⁴ We do not know of any case in which the validity of conditions, exempting telegraph companies from full liability for *repeated* messages, passing only over their own lines, has been affirmed. A condition requiring a special contract to be made with the superintendent for insurance, in order to secure liability for error, is void, as imposing impracticable delay.⁵

§ 554. Validity of other stipulations.—A stipulation that the company shall not be liable for damages in any case where the claim is not presented in writing,¹ within a specified rea-

77 Tex. 83; 13 S. W. 970; Gulf, etc. R. Co. v. Geer, 5 Tex. Civ. App. 349; 24 S. W. 86.

³ See § 555. *post*.

⁴ A telegraph company cannot, by contract, limit its liability for gross negligence or willful misconduct in transmitting messages (Dixon v. Western U. Tel. Co., 3 N. Y. App. Div. 60; 38 N. Y. Supp. 1056; Mowry v. Western U. Tel. Co., 51 Hun, 126; 4 N. Y. Supp. 666; Western U. Tel. Co. v. Crall, 38 Kans. 679; 39 Id. 580; 17 Pac. 309; Thompson v. Western U. Tel. Co., 64 Wisc. 531, and cases there cited; Candee v. Same, 34 Id. 471; Hibbard v. Same, 33 Id. 558; White v. Same, 14 Fed. 710). See Redpath v. Same, 112 Mass. 71; Birkett v. Same, 103 Mich. 361; 61 N. W. 645; Breese v. U. S. Tel. Co., 48 N. Y. 132, 141; to the effect that only gross negligence on the part of the company will relieve the sender of a message from the stipulation as to repeating it.

⁵ Tyler v. Western U. Tel. Co., 60 Ill. 421.

¹ While the requirement of notice in writing is held reasonable (Smith, etc. Shoe Co. v. Western U. Tel. Co., 49 Mo. App. 99), it may be

waived by putting objections only on other grounds (Hill v. Western U. Tel. Co., 85 Ga. 425; 11 S. E. 874); or offering settlement (Western U. Tel. Co. v. Stratemeier, 6 Ind. App. 125; 32 N. E. 871). Mere verbal statements made to, and interviews with, the company's operators, and indefinite statements as to damages, in the absence of any claim for damages, or demand for payment, held. no waiver (Albers v. Western U. Tel. Co., Iowa, ; 66 N. W. 1040); and so held of an oral claim followed by an oral promise by the agent to look the matter up (Massengale v. Western U. Tel. Co., 17 Mo. App. 257). In Indiana, it is held that such a condition applies to the statutory penalty (Western U. Tel. Co. v. Yopst, 118 Ind. 248; 20 N. E. 222). So, perhaps, in Missouri (Montgomery v. Western U. Tel. Co., 50 Mo. App. 591). But not so in Georgia or Arkansas (Western U. Tel. Co. v. Cooledge, 86 Ga. 104; 12 S. E. 264; Western U. Tel. Co. v. Cobbs, 47 Ark. 344; 1 S. W. 558); and an express agreement to that effect is void (Mathis v. Western Union Tel. Co., 94 Ga. 338; 21 S. E. 564, 1039).

sonable time,² is valid,³ to this extent, that it protects it against claims made at a later time by the sender,⁴ or by the person to whom the message is addressed, if he stands in privity with the stipulation of the sender,⁵ if not in all cases. Under this condition, presentation of the claim to the resident agent, who received the message, is enough.⁶ The commencement of an

² Everywhere it is held, at common law, that the limitation of time must be reasonable (see the cases below).

³ It is almost everywhere held that sixty days is a reasonable limit, in ordinary cases, where mail communication is daily and quick (*Western U. Tel. Co. v. Meredith*, 95 Ind. 93; *Same v. Jones*, Id. 228; *Same v. Rains*, 63 Tex. 27; *Sherrill v. Western U. Tel. Co.*, 109 N. C. 527; 14 S. E. 94; *Hill v. Western U. Tel. Co.*, 85 Ga. 425; 11 S. E. 874; *Western U. Tel. Co. v. Dougherty*, 54 Ark. 221; 15 S. W. 468; *Kendall v. Western U. Tel. Co.*, 56 Mo. App. 192; *Russell v. Western U. Tel. Co.*, 57 Kans. 230; 45 Pac. 598). The sixty days' limit was, however, held void in *Francis v. Western U. Tel. Co.*, 58 Minn. 252; 59 N. W. 1078. A limit of thirty days has been held unreasonable and void (*Johnston v. Western U. Tel. Co.*, 33 Fed. 362). But it has more often been held valid, where no reason was shown for non-compliance (*Beasley v. Western U. Tel. Co.*, 39 Fed. 181; *Western U. Tel. Co. v. Culberson*, 79 Tex. 65; 15 S. W. 219; *Western U. Tel. Co. v. Dunfield*, 11 Colo. 335; 18 Pac. 34). In *Heimann v. Western U. Tel. Co.* (57 Wisc. 562; 16 N. W. 32), a limit of twenty days was held sufficient. The reasonableness of the stipulation as to length of time was held clear, as matter of law. We take leave to disagree with this opinion. Twenty days are possibly sufficient, in some cases, but they are clearly *not* suf-

ficient in many cases, as, for example, in messages passing between the Atlantic and Pacific coasts. Indeed, it is barely sufficient in *any* case. The fact that the exact amount of damages could not be ascertained within the sixty days will not dispense with the necessity of presenting the claim within that time, as the amount of damages need not be stated in the claim in specific terms (*Manier v. Western U. Tel. Co.*, 94 Tenn. 442; 29 S. W. 732).

⁴ The cases above cited related to *senders* of messages.

⁵ The receiver of a message, as well as the sender, is bound by a condition in the contract requiring claims for damages to be presented within sixty days (*Findlay v. Western U. Tel. Co.*, 64 Fed. 459; *Manier v. Western U. Tel. Co.*, 94 Tenn. 442; 29 S. W. 732). So held, where the message relates to the business of both parties, and is a reply to a previous message sent by the receiver (*Western U. Tel. Co. v. James*, 90 Ga. 254; 16 S. E. 83). Such a condition does not bind the addressee proceeding under Rev. St. Ind., § 4177 (*Western U. Tel. Co. v. McKibben*, 114 Ind. 511; 14 N. E. 894).

⁶ *Western U. Tel. Co. v. Blanchard*, 68 Ga. 299; *Hill v. Western U. Tel. Co.*, 85 Id. 425; 11 S. E. 874. Notice of a claim for negligence in delivering a telegram, to the agent who received and delivered it, is a compliance with a stipulation requiring notice to the "company" (*Western U. Tel. Co. v. May*, 8 Tex. Civ. App.

action, with service of a complaint stating the facts, is a sufficient "claim,"⁷ unless the stipulation clearly provides that no action shall be brought until after a claim has been served. We have no doubt that whenever, owing to peculiar circumstances, it would be unreasonable to enforce a limitation, however reasonable it might be under ordinary circumstances, it will not be enforced.⁸ But the courts, in such cases, are apt to require an attempt, in good faith, to comply with the spirit and substance of the stipulation.⁹ In some states, stipulations of this kind are regulated¹⁰ or entirely prohibited¹¹ by statute. In the absence of fraud, accident, or mistake, a provision in the contract that the company shall not be required to deliver the message until the succeeding day, is binding.¹²

176; 27 S. W. 760). Notice by a married woman of a claim for failure to deliver a message addressed to her, is sufficient to support an action by her husband on such claim (Western U. Tel. Co. v. Kinsley, 8 Tex. Civ. App. 527; 28 S. W. 831). Delivery to a messenger boy of such a notice is not notice to the company (Western U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60; 30 S. W. 70.)

⁷ The bringing of suit and service of process, within the time, is equivalent to presentation (Western U. Tel. Co. v. Henderson, 89 Ala. 510; 7 So. 419); Western U. Tel. Co. v. Trumbell, 1 Ind. App. 121; 27 N. E. 313; Western U. Tel. Co. v. Karr, 5 Tex. Civ. App. 60; 24 S. W. 302; Western U. Tel. Co. v. Piner, 9 Tex. Civ. App. 152; 29 S. W. 66). To the contrary is Western U. Tel. Co. v. Ferguson, Tex. Civ. App. ; 27 S. W. 1048 [under the Texas ninety-day statute].

⁸ See Smith, etc. Shoe Co. v. Western U. Tel. Co., 49 Mo. App. 99. Even the sixty days' limit is not reasonable and will not be enforced in case of a message from Philadelphia to Shanghai, to which no answer would come in the ordinary course

of business except by mail (Conrad v. Western U. Tel. Co., 162 Pa. St. 204; 29 Atl. 888).

⁹ Thus, where plaintiff, to whom the message was directed, did not learn that it had been sent until ten days after it was delivered to defendant, it was error to instruct the jury that the sixty days did not begin to run until plaintiff learned that the message had been sent him (Western U. Tel. Co. v. Phillips, 2 Tex. Civ. App. 608; 21 S. W. 638). In such case the question should be submitted to the jury as to whether plaintiff had a reasonable time, after learning that the message had been sent, in which to present his claim before the expiration of the sixty days (Id.).

¹⁰ In Texas, stipulations for notice of claims for damages, if unreasonable, or requiring notice within less than ninety days, are void (Western U. Tel. Co. v. Jobe, 6 Tex. Civ. App. 403; 25 S. W. 168, 1036).

¹¹ All such conditions are void in Nebraska by statute (Pacific Tel. Co. v. Underwood, 37 Neb. 315; 55 N. W. 1057 [Comp. St., c. 89a, § 12]; Western U. Tel. Co. v. Kemp, 44 Neb. 194; 62 N. W. 451).

¹² Western U. Tel. Co. v. McCoy, Tex. Civ. App. ; 31 S. W. 210.

So is a condition that the company's messenger, sent to deliver a telegram for transmission, shall be deemed the agent of the sender.¹³

§ 555. Effect of stipulations. — Stipulations limiting the liability of a telegraph company, when assented to by the sender of the message, are to receive substantially the same construction as is given by the courts to similar stipulations for the benefit of a common carrier. Since unreasonable stipulations would be held altogether void,¹ every stipulation of this kind which is enforced at all must be so construed as to be reasonable.² Thus, an unqualified stipulation that the company shall not be liable for mistakes, errors or delays, arising from "any cause," will either be held entirely void or else to refer only to mistakes, errors and delays which are not the result of the company's negligence.³ If the company wishes to protect itself from liability, for the faults of its own agents, it must secure an explicit agreement to that effect.⁴ The usual condition that the company shall not be liable, beyond the amount of the toll paid, in case of negligent mistakes or delays in the transmission or delivery of an unrepeatd message, or

A regulation of a company that it will receive messages to be sent without repetition during the night for delivery not earlier than the morning of the next day, at reduced rates, is valid (*Fowler v. Western Union Tel. Co.*, 80 Me. 381; 15 Atl. 29).

¹³ *Will v. Postal Cable Co.*, 3 N. Y. App. Div. 22; 37 N. Y. Supp. 933. Such a condition is waived by the company's directing the messenger delivering the message to obtain an answer according to the request in the message (*Ib.*).

¹ See all the cases cited in note 3, § 554, *ante*.

² See § 554, note 8, *ante*. A time limitation does not apply when, within that time, plaintiff did not know, and could not reasonably learn, what damages, if any, he had sustained (*Heron v. Western U. Tel.*

Co., 90 Iowa, 129; 57 N. W. 696). See also *Western U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608; 30 S. W. 494.

³ So held, as to goods-carriers (*Mynard v. Syracuse, etc. R. Co.*, 71 N. Y. 180; *Westcott v. Fargo*, 61 Id. 542). An agreement not to claim damages for errors or delays, or for non-delivery of the message, does not exonerate from liability for failing to send the message (*Garrett v. Western U. Tel. Co.*, 83 Iowa, 257; 49 N. W. 88). A stipulation that "the company will not be liable for unavoidable interruption in the working of its lines" does not cover the exclusive use for the time of the wire in sending train orders (*Western U. Tel. Co. v. Rosentreter*, 80 Tex. 406; 16 S. W. 25).

⁴ *McKinney v. Jewett*, 24 Hun, 19; and cases in last note.

for its non-delivery (where such a condition is permitted), is to be construed as referring only to such mistakes, delays or failures to deliver as might be reasonably supposed to be guarded against by repeating.⁵ It should not protect against liability, even for an error of this description, if the error is of such a nature that the receiving operator can see that there is some mistake, which he might correct by inquiry over the wire, and he omits to do so. It does not protect the company from liability to a receiver of the message, having no notice of the mistake, who is not called on to repeat the message back,⁶ unless

⁵ In *Manville v. Western U. Tel. Co.* (37 Iowa, 214), it was held that, notwithstanding the usual stipulation as to unrepeatd messages, the company is liable for mistakes, resulting from its own negligence, which would not have been avoided by repetition. There the telegram was in the office for four days before it was given for delivery to the plaintiff (owing to a mistake in the plaintiff's name). See *Western U. Tel. Co. v. Fenton*, 52 Ind. 1. Such a stipulation does not apply to the case of a failure to deliver a message which, though not repeated, was correctly, and without delay, transmitted to the office from which it was to be delivered (*Western U. Tel. Co. v. Henderson*, 89 Ala. 510; 7 So. 419; *Western U. Tel. Co. v. Broesche*, 72 Tex. 654; 10 S. W. 734; *Western U. Tel. Co. v. Linn*, 87 Tex. 7; 26 S. W. 490). See also *Fleischer v. Pacific Cable Co.*, 55 Fed. 738; *aff'd*, 66 Fed. 899; 14 C. C. A. 166. But in *Clement v. Western U. Tel. Co.* (137 Mass. 463), it was held that gross negligence on the part of the company's messenger-boy, in delaying the delivery of a message sent under the usual stipulation as to repeating, did not make the company liable beyond the amount of the toll. The court do not discuss principles, but say: "The negligence of mes-

senger-boys, in delivering messages, was plainly contemplated by the parties when they entered into the stipulation." This case stands alone, and it would be difficult to support it by any sound reasoning. It is one of those bad decisions in favor of great corporations, for which Massachusetts is unfortunately noted.

⁶ Notice that the company is not liable for mistakes in unrepeatd messages, being intended for the sender and not for the receiver, does not, even though printed on the back of the blank used, charge the receiver and exonerate the company from liability to him (*Western U. Tel. Company v. Richman* [Penn.], 8 Atl. 171; *Tobin v. Western U. Tel. Co.*, 146 Pa. St. 375; 23 Atl. 324). s. p., *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383. In the latter case the court well say: "The proposition that the defendants are liable, if at all, only in case the message is repeated, as contained in the printed conditions, can be invoked only against the sender of the message, if against any; for it is his message, his language that is to be transmitted; and it is only known to the receiver, when delivered, and as delivered. He is to be guided and informed by what is delivered to him; and he has no opportunity to

the receiver stands in such privity with the sender that he is bound by the sender's contract, and the sender, under the above rules, would be precluded from recovery. A mistake in telegraphing the name of the place from which⁷ or to which⁸ the message is sent, is not within the scope of such a stipulation, as it is no part of the real message. A stipulation against liability for errors in the transmission of cipher or obscure messages, even when valid, will not be allowed to excuse neglect in transmitting plain English words, used in the ordinary commercial language of the day, however concise.⁹ Nor does such

agree upon any such condition before delivery." To the same effect is *Western U. Tel. Co. v. Fenton*, 52 Ind. 1. In *Western U. Tel. Co. v. Neill* (57 Tex. 283), upon the face of the message there was an ambiguity in the use of the word "have," which required an explanation; and for this purpose the receiver went to the office to have the message repeated. This was not done, however, for the reason that the operator said that it was correct as received by him. This was before any damage had occurred, and when, in all probability, it might have been avoided by having the message repeated. Held, that in an action *ex delicto*, where, from the face of the message or otherwise, knowledge is brought home to the party to whom the message is sent that there is a probable error, the failure to have the message repeated, where this can be done before the damage has occurred, would be such contributory negligence as should defeat his right to recover. Hence, judgment for plaintiff was reversed. This seems to us a thoroughly unsatisfactory decision. It requires one who has reason to suspect a mistake on the part of the company, not only to inquire of the proper officer or servant, but on being assured by him that there is no mistake, to pay the

company for repeating the service in order to test the truth of the assurance. When such a question is brought to the attention of the proper officer, the company ought to make the necessary inquiry or take the responsibility of not doing so. If this is requiring too much under the regulation as to repeating, it at least seems clear that the operators should be silent or warn the customer that he should have a repetition. We think that the company was bound by an estoppel, at least as strong as that in *Continental Nat. Bank v. Nat. Bank Commonwealth*, 50 N. Y. 575.

⁷ *Western Union Tel. Co. v. Simpson*, 73 Tex. 422; 11 S. W. 385.

⁸ *Western U. Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460; 22 S. W. 656.

⁹ In *Telegraph Co. v. Griswold* (37 Ohio St. 301), the message furnished was, "Will you give one fifty for 2,500 at London?"—meaning: "Will you pay \$1.50 for 2,500 bushels of flaxseed at London, Ontario?" As delivered, it read: "Will you give one five for 2,500 at London?" Held, that the message was not obscure within the meaning of the stipulation. It appeared upon its face that it related to a business transaction, involving the purchase and sale of property. The company was, therefore, apprised of the fact that a pecu-

a condition exonerate the company for negligence in the delivery of a cipher message after it has been transmitted correctly.¹⁰ A contract exempting the company from liability for delay in the "transmission" of a message, applies only to its transmission over the wires, and not to the delivery of the message after it has been sent over the wires.¹¹ A stipulation exempting the company for liability for the non-transmission and non-delivery of messages does not protect it from liability, where it receives a message and makes no effort whatever to forward it.¹² Nor does the stipulation limiting the time within which claims must be presented apply to such a case.¹³ A contract or notice, declaring that the company "guarantees correctness only when messages are repeated," does not relieve it in any degree from liability for negligence in respect to unrepeated messages.¹⁴

§ 556. Evidence under special contracts.— We can see no reason whatever for supposing that a stipulation, shielding a telegraph company from liability for its negligence, should be held void, as to its avowed purpose, and yet valid enough to cast the burden of proving negligence upon the plaintiff with any more strictness than is applied in other cases. Nor can

niary loss might result from an incorrect transmission of the message. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit the message in the language in which it was received. In *Western U. Tel. Co. v. Blanchard* (68 Ga. 299), the message furnished was: "Cover 200, September; 100, August." As delivered, it was, "Cover 200, September; 200, August." Held, that it was not error to refuse defendant's request for an instruction in substance, that if the jury believe that the message is obscure, and nothing to indicate its importance, or that special damage might result, that the measure of damage would be the tolls paid. The court say, that there was at least enough known to show that a com-

mercial value attached to the message, and that is sufficient. Apparently to the contrary is the hasty ruling of a single judge (*White v. Western U. Tel. Co.*, 14 Fed. 710, 718, note).

¹⁰ *Western U. Tel. Co. v. Fatman*, 73 Ga. 285; *Same v. Way*, 83 Ala. 542; 4 So. 844.

¹¹ *Bryant v. American Tel. Co.*, 1 Daly, 575.

¹² *Birney v. N. Y. & Washington Tel. Co.*, 18 Md. 341.

¹³ *Western U. Tel. Co. v. Way*, 83 Ala. 542; 4 So. 844; *Western U. Tel. Co. v. Michelson*, 94 Ga. 436; 21 S. E. 169; *Western U. Tel. Co. v. Yopst*, 118 Ind. 248; 20 N. E. 222; *Barrett v. Western U. Tel. Co.*, 42 Mo. App. 542.

¹⁴ *Baldwin v. U. S. Tel. Co.*, 54 Barb. 505; 6 Abb. N. S. 405.

we see any foundation for holding that a stipulation against liability for mistakes, not negligent, should have any similar effect. But in courts which hold stipulations against liability for negligence valid though not as against gross negligence, it is held that mere proof of an error in the wording of a message, as delivered, although sufficient to make a presumptive case of negligence, as already stated, is not sufficient to raise a presumption of gross negligence.¹ Under a condition that the company is not to be liable for defaults of other companies, a company delivering a dispatch in an erroneous form has the burden of proving that it received it from another company in the same form.²

§ 556a. Contributory negligence. — The plaintiff cannot recover for a delay which was caused by his own refusal to give a full and clear address, after being requested to do so,¹ nor where delay is caused by a wrong address,² but not so where no better address was requested, and that given was correct, so far as it went.³ Notwithstanding an error in the address, the plaintiff may recover, if the telegraph agent could, by the use of ordinary diligence and care, have found the correct address.⁴ It is not contributory negligence for the

¹ *Womack v. Western U. Tel. Co.*, 58 Tex. 176; *Aiken v. Western U. Tel. Co.*, 69 Iowa, 31; 28 N. W. 419; *Becker v. Western U. Tel. Co.*, 11 Neb. 87; 7 N. W. 868; and see *Lassiter v. Western U. Tel. Co.*, 89 N. C. 334; *White v. Western U. Tel. Co.*, 14 Fed. 710, 718, note; *Jones v. Western U. Tel. Co.*, 18 Fed. 717. Compare *Hart v. Western U. Tel. Co.*, 66 Cal. 579; 6 Pac. 637; *Tyler v. Western U. Tel. Co.*, 60 Ill. 421; *Telegraph Co. v. Griswold*, 37 Ohio St. 301.

² *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383.

³ *Western U. Tel. Co. v. McDaniel*, 103 Ind. 294; 2 N. E. 709. In this case, the action was for the statute penalty; but without doubt the same

principle applies in a non-statutory action for damages.

⁴ Where a sender gives a wrong street address, and the message is taken to such address, the company is not liable for failure to deliver unless it knew or could have ascertained the proper address (*Western U. Tel. Co. v. Patrick*, 92 Ga. 607; 18 S. E. 980).

⁵ Mere failure to indicate the street and number will not relieve the company from liability (*Western U. Tel. Co. v. Smith*, 93 Ga. 635; 21 S. E. 166).

⁶ It is no excuse for delay that the message was addressed to "Wallace" instead of "Wallis," there being no place in the state of the former name, if the agent knew of

addressee of a message summoning him to a distant place, instead of a nearer place from which he expected a message, not to ascertain whether there was a mistake, before starting on the longer journey.⁵

the existence of the latter town, and Pa. St. 375 ; 23 Atl. 324. There, the failed to send it to that point (Beasley v. Western U. Tel. Co., 39 Fed. 181 ; and see note 2, *supra*). message read as if sent from South Carolina, instead of Staten Island, from which latter place the message

⁵ Tobin v. Western U. Tel. Co., 146 was expected to come.

PART VI.

PERSONAL SERVICES.

CHAPTER XXIV. ATTORNEYS AND COUNSELLORS.

XXV. BANKERS AND BILL COLLECTORS.

XXVI. CLERKS AND RECORDING OFFICERS.

XXVII. NOTARIES PUBLIC.

XXVIII. PHYSICIANS AND SURGEONS.

XXIX. SHERIFFS AND CONSTABLES.

CHAPTER XXIV.

ATTORNEYS AND COUNSELLORS AT LAW.

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| § 557. The relation of attorney and client. | § 567. Negligence in instituting proceedings. |
| 558. Degree of skill, etc., required of an attorney. | 568. Obligation to proceed in the cause. |
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| 566. Burden of proof. | 576. Liability for disclosing privileged communication. |
| | 577. Liability for partners or agents. |

§ 557. The relation of attorney and client. — The technical relation of an advocate and client in litigation, which,

under English law, creates on the one hand the incapacity to make a contract of hiring as an advocate,¹ and on the other affords him immunity from actions grounded on an imputation of negligence in the *bona fide* discharge of his duties,² is not generally recognized in this country³ or in Canada,⁴ where it is well settled that the relation of attorney and client may exist between counsel and one who engages his services in a professional capacity; and where that relation exists, he is responsible to his client, like an attorney, for negligence in the discharge of his duty. In speaking of attorneys, therefore, we mean *lawyers* — persons acting professionally in legal formalities, negotiations or proceedings, by the warrant or delegation of their client.⁵

¹ *Kennedy v. Broun*, 13 C. B. N. S. 677, per Erle, C. J. In this country, at an early day, the rule that counsel could not sue for services was adopted in Pennsylvania (*Mooney v. Lloyd*, 5 Serg. & R. 412, decided in 1819, overruling *Brackenridge v. McFarlane*, Add. 49, which was decided in 1793), and is still maintained in New Jersey (*Seeley v. Crane*, 3 Greene, 35; *Van Atta v. McKinney*, 16 N. J. Law, 235), and to some extent in the Federal Courts (*Law v. Ewell*, 2 Cranch, C. C. 144); but the principle was afterwards rejected in Pennsylvania (*Gray v. Brackenridge*, 2 P. & W. 75; *Foster v. Jack*, 4 Watts, 334; *Balsbaugh v. Frazer*, 19 Pa. St. 95; *Lynch v. Commonwealth*, 16 Serg. & R. 368). In other states, it has been expressly decided that counsel, as well as attorneys, may recover compensation by action. So held in *New York* (*Stevens v. Adams*, 23 Wend. 57; 26 Id. 451; *Wilson v. Burr*, 25 Id. 386; *Wallis v. Loubat*, 2 Denio, 607; *Merritt v. Lambert*, 10 Paige, 352; *Lynch v. Willard*, 6 Johns. Ch. 342); in *Massachusetts* (*Brigham v. Foster*, 7 Allen, 419; *Ames v. Gilman*, 10 Metc. 239; *Thurston v. Percival*, 1 Pick. 415; see *Buckland v. Conway*, 16 Mass.

396); in *Vermont* (*Briggs v. Georgia*, 10 Vt. 68; *Vilas v. Downer*, 21 Id. 419); in *Pennsylvania* (*Balsbaugh v. Frazer*, 19 Pa. St. 95; *Foster v. Jack*, 4 Watts, 334; *Gray v. Brackenridge*, 2 P. & W. 75); in *Delaware* (*Stevens v. Monges*, 1 Harringt. 127); in *South Carolina* (*Duncan v. Breithaupt*, 1 McCord, 149; *Clendinen v. Black*, 2 Bailey, 488); in *Ohio* (*Christy v. Douglas*, Wright, 485); in *Illinois* (*Cooper v. Delavan*, 61 Ill. 96); in *Kentucky* (*Rust v. Larue*, 4 Litt. 411, 417; *Caldwell v. Shepherd*, 6 Monr. 389); in *Tennessee* (*Newnan v. Washington*, Mart. & Yerg. 79); in *Missouri* (*Webb v. Browning*, 14 Mo. 354); in *Texas* (*Baird v. Ratcliff*, 10 Tex. 81); and in *Florida* (*Carter v. Bennett*, 6 Fla. 214).

² *Swinfen v. Lord Chelmsford*, 1 Fost. & F. 619; aff'd, 5 Hurlst. & N. 899; *Perring v. Rebutter*, 2 M. & Rob. 429; *Fell v. Brown*, Peake, N. P. 96; *Turner v. Philipps*, Id. 122.

³ Cases cited in note 1, *supra*.

⁴ *McDougall v. Campbell*, 41 Upper Canada [Q. B.], 332.

⁵ It seems, that a person, not legally authorized to practice law, employed to conduct judicial proceedings, is not legally responsible to his employer for his ignorance in respect

§ 558. Degree of skill, etc., required of attorneys. — An attorney who undertakes to conduct legal proceedings professes himself to be reasonably well acquainted with the law and the rules and practice of the courts; and he is bound to exercise in the conduct of such proceedings a reasonable degree of prudence, diligence and skill. He does not profess to know all the law, or to be incapable of misunderstanding or misapplying it to new and nice questions; for the most skillful counsel, and even judges, “may differ or doubt, and take time to consider.”¹ What an attorney does profess and undertake, and all that he professes and undertakes, is, first, that he possesses the knowledge and skill common to members of his profession, and, second, that he will exercise, in his client’s business, an ordinary and reasonable degree of attention, prudence and skill.² It is said not to be enough to exhibit the same skill and diligence in his client’s affairs that he does in his own³ — a lawyer’s carelessness and unskillfulness in his own legal affairs being proverbial.

thereto (*Wakeman v. Hazleton*, 3 Barb. Ch. 148). But he is liable as an agent for a fraud on his employer (*Freelove v. Cole*, 41 Barb. 318).

¹ *Pitt v. Yalden*, 4 Burr. 2060, per Lord Mansfield; see *Kemp v. Burt*, 4 Barn & Adol. 424; *Bulmer v. Gilman*, 4 Man. & G. 108; *Donaldson v. Haldane*, 7 Clark & Fin. 762. In *Montrieu v. Jefferys* (2 Carr. & P. 113), the court charged the jury: “No attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or counsel, or even a judge, is bound to know all the law.”

² In *Lanphier v. Phipos* (8 Carr. & P. 479), Tindal, C. J., speaking of the degree of skill required of a surgeon, said: “An attorney does not undertake, at all events, you shall gain your cause, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have

higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill.” *s. p.*, *Bowman v. Tallman*, 2 Rob. 385; *aff’d*, 40 How. Pr. 42; 3 Abb. Ct. App. 182, *note*; *Weimer v. Sloane*, 6 McLean, 259; *Ex parte Gilbertson*, 4 Cranch C. C. 503; *Watson v. Muirhead*, 57 Pa. St. 161; *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24, 34; 12 N. E. 88; *Moorman v. Wood*, 117 Ind. 144; 19 N. E. 739; *Goodman v. Walker*, 30 Ala. 482; *Gambert v. Hart*, 44 Cal. 542; *Morrill v. Graham*, 27 Tex. 646; *Fox v. Jones* [Tex.], 14 S. W. 1007. Testimony of other lawyers as to whether, in their opinion, the advice given by defendant was such as a prudent, careful lawyer, of ordinary capacity and intelligence, would or ought to have given, under the circumstances is admissible (*Cochrane v. Little*, 71 Md. 323; 18 Atl. 698).

³ *Wharton, Neg.*, § 748.

§ 559. **General rule of liability.** — While it is not difficult to deduce a general rule governing an attorney's liability for unskillfulness, if we consider alone the actual *decisions* of the courts, yet it will be found not a little difficult to reconcile with sound principle the language which the judges have employed in many of the reported cases. As juries are popularly supposed, in disputes between lawyers and their clients, to display a bias toward the latter, it may well be that judges have sometimes shown a corresponding liberality toward the former. Thus, it has been stated in cases of undoubted authority, that lawyers are liable to their clients only for gross negligence and utter incompetency.¹ It may be, and so it has sometimes been held, that to defeat an attorney's claim for compensation in a professional matter, such services must be shown to have been utterly worthless;² but it does not follow that in an action

¹ *Baikie v. Chandless*, 3 Campb. 17; *Purves v. Landell*, 12 Clark & Finn. 91; *Lynch v. Commonwealth*, 16 Serg. & R. 368; and see *Palmer v. Ashley*, 3 Ark. 75; *Gilbert v. Williams*, 8 Mass. 57. In *Wilson v. Russ* (20 Me. 421), *Emery, J.*, said: "The attorney is bound to execute business in his possession, intrusted to his care, with a reasonable degree of care, skill, and dispatch. If the client be injured by the gross fault, negligence, or ignorance of the attorney, the attorney is liable; but if he act with good faith, to the best of his skill, and with an ordinary degree of attention, he will not be responsible." In *Holmes v. Peck* (1 R. I. 245), it was said that "the want of ordinary care and skill [in an attorney] is gross negligence." In *Pennington v. Yell* (11 Ark. 212), *Scott, J.*, although conceding that "reasonable diligence and skill constitute the measure of an attorney's engagement to his client," yet he went on to say, "he is liable only for gross negligence or gross ignorance in the performance of his professional duties." The same idea was

expressed by the court in *Evans v. Watrous* (2 Port. [Ala.], 205), but in a later well-considered case in the same court, its fallacy was pointed out (*Goodman v. Walker*, 30 Ala. 482). In *Cox v. Sullivan* (7 Ga. 144), *Nisbet, J.*, said: "An attorney is not bound to extraordinary diligence. He is bound to *reasonable skill and diligence*; and the *skill* has reference to the character of the business he undertakes to do. Reasonable skill constitutes the measure of his engagement, and he is responsible for ordinary neglect." In a later case, it was held that where an attorney acted in good faith, and with a fair degree of intelligence, in the discharge of his duties under the usual implied contract, any error which he may make must be so gross as to render wholly improbable any disagreement among good lawyers as to the manner of the performance of the services in the given case. before he can be held responsible (*Babbitt v. Bumpus*, 73 Mich. 331; 41 N. W. 417).

² The cases are by no means agreed on this point; and perhaps the

against an attorney for damages resulting from his want of skill or diligence, gross negligence, and nothing short of it, must be shown. The true rule of liability undoubtedly is, that an attorney is liable for a want of such skill, prudence and diligence as lawyers of ordinary skill and capacity, versed in the particular practice at the particular bar,³ commonly possess and exercise.⁴ In absence of express representation, he will

weight of authority is now in favor of admitting any evidence of negligence, ignorance, or want of skill as a defense to an action for professional services, as well as for any other work and labor (see 2 Greenl. on Ev., § 143, and cases there cited). And see, also, *Bowman v. Tallman*, 2 Robertson, 385; *Carter v. Tallcott*, 2 How. Pr. N. S. 352; *Caverly v. McOwen*, 123 Mass. 574; *Cousins v. Paddon*, 2 Crompt. M. & R. 547; *Randall v. Ikey*, 4 Dowl. P. C. 682; *Huntley v. Bulwer*, 6 Bing. N. C. 111; *Lewis v. Samuel*, 8 Q. B. 685; *Hopping v. Quin*, 12 Wend. 517; *Long v. Orsi*, 18 C. B. 610; *Hill v. Featherstonhaugh*, 7 Bing 569; *Hill v. Allen*, 2 Mees. & W. 284; *Symes v. Nipper*, 12 Ad. & El. 377, *n.*; *Bracey v. Carter*, Id. 373; *Wend v. Bond*, 21 Ga. 195. An act of impropriety or neglect on the part of an attorney in transacting his client's business, if condoned, will not defeat his action for services (*Gleason v. Kellogg*, 52 Vt. 14).

³ Whart. Negl., § 750, and Whart. on Agency, § 596 [attorney required to show skill as specialist]; also Green's note to Story on Agency, § 27.

⁴ *Stevens v. Walker*, 55 Ill. 151. In *Godefroy v. Dalton* (6 Bing. 461), Tindal, C. J., said: "The cases however, appear to establish in general that he is liable for the consequences of ignorance or non-observance of the rules of practice of the courts, for want of care in the preparation

of the cause for trial, or of attendance thereon with his witnesses, or for the mismanagement of so much of the conduct of a cause as is usually allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law." In *Hart v. Frame* (6 Clark & Fin. 193, 210), in the House of Lords, the Lord Chancellor (Cottenham) said: "Professional men, possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion. Every case, therefore, ought to depend upon its own peculiar circumstances; and when an injury has been sustained which could not have arisen except from *the want of such reasonable care and diligence*, or the absence of the employment of either on the part of the attorney, the law holds him liable. In undertaking the client's business, he undertakes for the existence and for the due employment of those qualities, and receives the price of them." And see *Stephenson v. Rowand*, 2 Dow & Cl. 119. s. p., *Russell v. Pal-*

be presumed to have held himself out as possessing such skill and knowledge as attorneys of his own state might reasonably be supposed to possess, and no more.⁵ And he is not chargeable with ignorance or negligence in accepting as a correct exposition of the law a decision of the court of last resort of his own state,⁶ provided such decision had not been reversed by the Federal Supreme Court.⁷

§ 560. When liable for gross negligence only. — Such is the general rule; but, as each case is to be decided upon its own peculiar facts, it is not difficult to conceive a case where an attorney would be liable only for gross negligence. If he, at the outset, frankly acknowledges to his client his want of experience or skill in a particular department of business, or if the client becomes aware of it in some other way, and, notwithstanding, entrusts his business to the attorney, the client cannot complain of the latter's want of that which he knew never existed. It might, however, become a question in such a case, how far the attorney was bound to consult counsel, and whether a neglect to do so did not amount to a want of ordinary care and prudence.

§ 561. Liability to summary jurisdiction of court. — As officers of the courts to which they are admitted to practice,

mer, 2 Wils. 325; Pitt v. Yalden, 4 Burr. 2061; Jones v. Lewis, 9 Dowl. P. C. 143; Hayne v. Rhodes, 8 Q. B. 342; Stannard v. Ullithorne, 10 Bing. 491; Walpole v. Carlisle, 32 Ind. 415; Carter v. Talcott, 2 How. Pr. N. S. 352; Bowman v. Tallman, 2 Robt. 385. The rule stated in the text, quoted and approved, in Gambert v. Hart, 44 Cal. 542. See Watson v. Muirhead, 57 Pa. St. 161; O'Barr v. Alexander, 37 Ga. 195; Stubbs v. Beene, 37 Ala. 627; Hatch v. Fogerty, 33 N. Y. Superior, 166; Suydam v. Vance, 2 McLean, 99.

⁵ Fenaile v. Coudert, 44 N. J. Law, 286 [New York lawyer employed there to draw contract for building on land in New Jersey].

⁶ Hastings v. Halleck, 13 Cal. 203. He is bound to know and how to

apply the law "clearly defined in elementary books or declared in adjudged cases, reported a sufficient length of time to become known to those who exercise reasonable diligence in keeping pace with the literature of the profession" (Citizens' Loan Ass'n v. Friedley, 123 Ind. 143; 23 N. E. 1075). In that case, defendant advised that a mortgage executed by husband and wife on land held by them as tenants by entireties was good. Afterwards the Supreme Court held such a mortgage void, as to both mortgagors. Held, not such a mistake as to make defendant liable to client, as well informed lawyers might well have differed in opinion on the subject.

⁷ Marsh v. Whitmore, 21 Wall. 178. See 21 Am. Law Rev. 252.

attorneys are subject to the courts for any want of good faith and honesty in their relations with clients.¹ The question of negligence will not in general be tried on motion, but only questions of good faith and integrity.² Proceeding on motion against an attorney for money collected is no bar to a recovery in an action on the case for his negligence in the suit.³ But proceeding by action for money collected is a waiver of the right to proceed by attachment.⁴

§ 562. Obligation not dependent upon compensation.—

The obligation of an attorney is to his client alone.¹ Thus, where, in answer to a casual inquiry by a stranger, he *bona fide* gives erroneous information as to the contents of a deed, he is not responsible to the inquirer.² To create the obligation, however, it is not necessary that there should be a compensation paid or to be paid. An attorney may be liable, although his

¹ This jurisdiction is assumed on the ground that, as the attorney acts as an officer of the court, it is the latter's duty to enforce the demands of justice between its officers and other persons employing them in their official capacity (*Matter of Wolf*, 51 Hun, 407; 4 N. Y. Supp. 239; see *Matter of Knapp*, 85 N. Y. 284; *Matter of Chittenden*, 4 N. Y. State R. 606; *aff'd* 105 N. Y. 679; 13 N. E. 930; *Matter of Husson*, 26 Hun, 130; 87 N. Y. 521 [enforcing delivery of client's documents retained without authority]; *Matter of Forster*, 49 Hun, 114; 1 N. Y. Supp. 619).

² *Sharp v. Hawker*, 3 Bing. N. C. 66; *Brazier v. Bryant*, 2 Dowl. P. C. 600; *Matter of Jones*, 1 Chit. 651; *De Woolfe v. —*, 2 Chit. 68; *Matter of Fenton*, 3 Ad. & El. 494; *Matter of Aitkin*, 4 Barn. & Ald. 47. The retention of money by an attorney, in good faith for the settlement of a disputed controversy concerning his right to retain it, is not a legal answer to a summary proceeding (*Bowling Green Sav. Bk. v. Todd*,

52 N. Y. 489; *Matter of Wolf*, 51 Hun, 407; 4 N. Y. Supp. 239).

³ *Coopwood v. Baldwin*, 25 Miss. 129. Motion should be made in the original action in which the misconduct was committed, not in the action against the attorney (*Granger v. Hughes*, 56 N. Y. Superior, 346; 3 N. Y. Supp. 828).

⁴ *Cottrell v. Finlayson*, 4 How. Pr. 242; see *Bohanan v. Peterson*, 9 Wend. 503. This subject, not falling within the scope of this treatise, is not pursued further. See *Weeks on Attorneys*, §§ 77, 105.

¹ An unsuccessful attempt was made in *Buckley v. Gray* (110 Cal. 339; 42 Pac. 900), by one who claimed to have been deprived of a legacy which a testator intended to bequeath him, to hold the attorney who drew the will on testator's retainer, for negligence in leaving it out: it being held that Cal. Code (§ 1559) that a contract expressly made for a third person may be enforced by him, did not authorize the action.

² *Fish v. Kelly*, 17 C. B. N. S. 194.

services were rendered gratuitously.³ But an attorney acting gratuitously is undoubtedly liable only for gross negligence. An attorney who takes legal proceedings in the name of another without authority is, of course, liable to such person,⁴ or to any other person who is immediately prejudiced thereby.⁵

§ 563. Retainer implies professional employment merely.

— Under a general retainer, in the absence of a special agreement, an attorney is not bound to take any steps in his client's business not implied by his profession. Under a general employment to collect a note placed in his hands before maturity, it has been held that an attorney is not bound to demand payment from the maker and give notice of dishonor to the indorser, it not being an undertaking implied by his profession.¹ But an attorney who is retained to do a particular act, and is directed at the same time to do whatever is needful in the matter, is bound to take such steps as have immediate relation to the act for which he is specially retained.²

³ Donaldson v. Haldane, 7 Clark & F. 762; Stephens v. White, 2 Wash. 203. Cavillaud v. Yale, 3 Cal. 108, to the contrary, cannot be sustained. As to sufficiency of pleading, see Bourne v. Diggles, 2 Chit. 311; Whitehead v. Greetham, 2 Bing. 464; Eccles v. Stephenson, 3 Bibb, 517; Burghart v. Gardner, 3 Barb. 64. The plaintiff may frame his action in assumpsit or case for the breach of duty (2 Chit. Pl. 373; Church v. Mumford, 11 Johns. 479; Stimpson Sprague, 6 Me. 470).

⁴ Westaway v. Frost, 17 Law J. [Q. B.] 286; Bradt v. Walton, 8 Johns. 298. A recovery against an attorney for unreasonably defending an action wherein he appeared without authority, and unskillfully conducting the defense, was sustained in O'Hara v. Brophy (24 How. Pr. 379); and see Bradt v. Walton, 8 Johns. 298; Ellsworth v. Campbell, 31 Barb. 134; Field v. Gibbs, Pet. C. C. 155; Minnikuyson v. Dorsett, 2 Harr. & Gill, 374; Coit v. Sheldon, 1

Tyler, 300; Hubbart v. Phillips, 13 Mees. & W. 702; Hoskins v. Phillips, 16 Law J. [Q. B.] 339; Dupen v. Keeling, 4 Car. & P. 102. The unauthorized appearance of an attorney gives validity to the proceeding against the client, and the remedy is either against the attorney or by motion in the action (Brown v. Nichols, 42 N. Y. 26; Gall v. Funkenstein, 10 N. Y. St. Rep. 331).

⁵ Andrews v. Hawley, 26 Law J. [Exch.] 323; see Cotterell v. Jones, 11 C. B. 713; Wood v. Hopkins, 2 Pennington, 689; Campbell v. Kincaid, 3 Monr. 68.

¹ Odlin v. Stetson, 17 Me. 244.

² Dawson v. Lawley, 4 Esp. 65. An attorney, retained to collect a bond and mortgage, who knew, or ought to know, of an impending tax sale, ought to give his client notice of such sale, and failing to do so, is liable for the consequent loss of the claim, to the extent of the value of the mortgage security (Waln v. Beaver, 161 Pa. St. 605; 29 Atl. 114).

§ 564. **Advice of counsel, how far a protection to an attorney.**— In England, where the duty of advising on points of law is more particularly within the province of barristers, it has been held to be the duty of an attorney to submit to the opinion of counsel all mere questions of law,¹ the forms of pleadings,² the kind of evidence to be adduced, etc.; and where, without consulting counsel, an attorney undertakes to determine questions of law, and to act upon his own opinion, he will be answerable for the consequences of any error he may commit;³ while the assistance of counsel will generally protect the attorney from liability.⁴ In general, in this country, an attorney is not relieved from responsibility by his personal employment of counsel;⁵ though the employment of counsel, and the following of his advice, ought, we think, to have weight on the question of the exercise of a proper degree of prudence by the attorney. If counsel is employed by the client himself, or by the attorney with the knowledge and acquiescence of the client, it would seem reasonable that the advice of such counsel should be taken into consideration, at least on the question of damages.

§ 565. **Negligence a question for the jury.**— The question of negligence, whether consisting in improper conduct or in mistake as to the law, is one of fact for the jury to determine under proper directions by the court.¹ But where the facts

¹ Where, therefore, an attorney for the plaintiff was advised by counsel that certain proofs were unnecessary, and in consequence of their non-production, the plaintiff was non-suited, the attorney was held not liable (*Godefroy v. Dalton*, 6 Bing. 460). But in matters peculiarly within the province of an attorney, and a knowledge of which the law will presume him to possess, the attorney cannot shift his responsibility by consulting counsel (*Ib.*). See *Goodman v. Walker*, 30 Ala. 482.

² See *Manning v. Wilkin*, 12 Law Times, 249.

³ See *Hart v. Frame*, 6 Clark & F.

193; *Stevenson v. Rowand*, 2 Dow & C. 104, 119.

⁴ Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded upon opinions of competent surveyors, and these opinions submitted to the judgment of the client, the court dismissed the bill (*Chapman v. Chapman*, L. R., 9 Eq 276).

⁵ *Smallwood v. Norton*, 20 Me. 83.

¹ In *Hunter v. Caldwell* (10 Q. B. 69, 82), Lord Denman said: "It was the province of the judge to inform

are undisputed, the court can determine, as matter of law, whether, in view of authorities attainable by proper research, any doubt in regard to the law is reasonable.²

§ 566. **Burden of proof.**—The plaintiff has the burden of proving defendant's negligence and actual damage resulting therefrom.¹ But an attorney who is employed to defend a cause, and does nothing, is bound to justify his conduct by showing, if he can, that there was no defense to the action;² and if, in the conduct of a cause, diligence would have been ineffectual, it is for him to show it.³

§ 567. **Negligence in instituting proceedings.**—It is actionable negligence for an attorney to bring his action in a court which has clearly no jurisdiction,¹ or to lay the venue in the

the jury for what species or degree of negligence an attorney was properly answerable, and what duty in the case before them was cast upon him, either by the statute or the practice of the courts; but, having done this, it was right to leave to them to say, considering all the circumstances, and the evidence of the practitioners, whether, in the first place, the attorney had performed his duty, and in the second, in case of non-performance, whether the neglect was of that sort or degree which was venial or culpable in the sense of not sustaining or sustaining the action." S. P., *Rhines v. Evans*, 66 Pa. St. 192; *Hogg v. Martin*, *Riley [Law]*, 156; *Pennington v. Yell*, 11 Ark. 212.

² *Bowman v. Tallman*, 2 Rob. 385; 40 How. Pr. 1; 3 Abb. Ct. App. 182, *note*; *Gambert v. Hart*, 44 Cal. 542. It is proper for the court, where the alleged negligence was in the misconstruction of a statute, to express to the jury an opinion that the interpretation of the statute in question was doubtful (*Bulmer v. Gillman*, 4 Man. & G. 103, 123).

¹ *Harter v. Morris*, 18 Ohio St. 492 [nominal damages not recoverable]. Damage must be alleged and proved (*Bruce v. Baxter*, 7 Lea, 477; *Bougher v. Scobey*, 23 Ind. 583; *Staples v. Staples*, 85 Va. 76; 7 S. E. 199. See *Wilson v. Coffin*, 2 Cush. 316; *Varnum v. Martin*, 15 Pick. 440; *Dearborn v. Dearborn*, 15 Mass. 315; *Pickett v. Pearsons*, 17 Vt. 470; *Suydam v. Vance*, 2 McLean, 99; *Braine v. Spalding*, 52 Pa. St. 247; *Wakeman v. Gowdy*, 10 Bosw. 208). S. P., *Seymour v. Cagger*, 13 Hun, 29; *O'Donohoe v. Whitty*, 2 Ontario R. 424 [burden on defendant in attorney's action for compensation].

² *Godefroy v. Jay*, 7 Bing. 413; *Swannell v. Ellis*, 1 Id. 347.

³ *Bourne v. Diggles*, 2 Chit. 311. S. P., *Brock v. Barnes*, 40 Barb. 521; *Howell v. Ransom*, 11 Paige, 538; *Jennings v. McConnell*, 17 Ill. 148. "There is reason for extending this rule; none for its abridgement" (*Moorman v. Wood*, 117 Ind. 144; 19 N. E. 739).

¹ *Williams v. Gibbs*, 5 Ad. & EL. 208. See *Lee v. Dixon*, 3 Post. & F.

wrong county,² or to proceed on the wrong section of a statute which gives the remedy;³ but negligence cannot be imputed to an attorney simply because the statutory proceeding taking by him was in law ineffectual to accomplish the purpose for which he was retained, or was made so by the decision of the court.⁴ It is negligence to prosecute too soon, as where an action was brought on a note on the last day of grace,⁵ or before all the requisite notices and other preliminaries have been disposed of,⁶ or before the facts have been sufficiently investigated to ascertain whether there is a right of action.⁷ On the other hand, if the attorney delays to commence an action, and in the meantime the statute of limitations bars the claim,⁸ or the debtor becomes insolvent, and the debt is lost,⁹ he is liable to his client. Negligence in the preparation of a writ, affidavit or pleading,¹⁰ or in omitting to sue one of the parties to a note,¹¹ whereby a loss is sustained, is actionable. Where the attorney is himself a party to the note, and he takes judgment against the other

744; *Fischer v. Langbein*, 103 N. Y. 84; 8 N. E. 251 [false imprisonment on void process].

² *Kemp v. Burt*, 4 Barn. & Ad. 424.

³ *Hart v. Frame*, 6 Clark & F. 193. In that case, certain masters employed an attorney to take proceedings against their apprentices for misconduct, and the attorney specifically proceeded on the section of the statute which related to servants, and not to apprentices; held, such want of skill or diligence as to render the attorney liable. And the fact that the magistrate proceeded in the first instance to convict on the wrong section furnished no excuse to the attorney for founding his proceedings upon it.

⁴ *Bowman v. Tallman*, 2 Rob. 385.

⁵ *Hopping v. Quin*, 12 Wend. 517.

⁶ *Long v. Orsi*, 18 C. B. 610. In that case, the negligence consisted in not seeing that a foreign bill of exchange, on which the action was brought, was not duly indorsed (see *Hunter v. Caldwell*, 10 Q. B. 69).

⁷ *Thwaites v. Mackerson*, 3 Carr. & P. 341; *Gill v. Lougher*, 1 Cr. & J. 170; *De Montmorency v. Devereux*, 7 Clark & F. 188.

⁸ *Stevens v. Walker*, 55 Ill. 151; *King v. Fourchy*, 47 La. Ann. 354; 16 So. 814; *Fox v. Jones* [Tex.], 14 S. W. 1007.

⁹ *Smedes v. Elmendorf*, 3 Johns. 185; *Staples v. Staples*, 85 Va. 76; 7 S. E. 199; *Morgan v. Giddings* [Tex.], 1 S. W. 369.

¹⁰ *Varnum v. Martin*, 15 Pick. 440 [omitting in a writ necessary words, *e. g.*, counting for \$12, instead of \$1,200]; *Walker v. Goodman*, 21 Ala. 647 [preparation of affidavit and writ]. See *Thompson v. Dickinson*, 159 Mass. 210; 34 N. E. 262 [defendant's attorney's neglect to plead special statute of limitations].

¹¹ *Wilcox v. Plummer*, 4 Pet. 172. But in such a case, it is a good defense, that a judgment against the party sued bound sufficient property to pay the debt, and that plaintiff vacated the judgment (*Ransom v. Cothran*, 6 Smedes & M. 167).

party only, he must show affirmatively that such judgment is collectible.¹²

§ 568. **Obligation to proceed in the cause.**—Where, however, the expediency of taking proceedings is doubtful, the attorney is justified in not prosecuting, unless specially directed to do so by his client.¹ If he disobeys the lawful instructions of his client, and a loss ensues, he is responsible,² notwithstanding he may have acted in good faith, and done what he honestly supposed to be for the interests of his client.³ But he is not bound to proceed unless his fees are tendered or secured to him, if he makes that request,⁴ and gives his client reasonable notice of his intention to abandon the cause.⁵

§ 569. **Conduct of cause.** — Having instituted proceedings, the attorney is bound to prosecute them with diligence.¹ He will be liable for improperly dismissing his client's suit,² though a nonsuit against a client is not, *per se*, evidence of negligence.³ The defendant's attorney is liable for allowing a judgment to go by default without his client's consent;⁴ but he is not liable

¹² *Moorman v. Wood*, 117 Ind. 144; 19 N. E. 739. But he cannot entirely defeat the action by showing that the client assigned the judgment, where it appears that the property upon which the judgment was a lien was covered by prior liens (*Id.*).

¹ *Crooker v. Hutchinson*, 2 Chipm. 117; *Lawrence v. Potts*, 6 Carr. & P. 428.

² *Gilbert v. Williams*, 8 Mass. 51; *Spangler v. Sellers*, 5 Fed. 842.

³ *Cox v. Livingston*, 2 Watts & S. 103; *Oldham v. Sparks*, 28 Tex. 425.

⁴ *Gleason v. Clark*, 9 Cow. 57; *Castro v. Bennet*, 2 Johns. 296; *Rowson v. Earle*, Mood. & M. 538; *Wadsworth v. Marshall*, 2 Cr. & J. 665.

⁵ In *Mordecai v. Solomon* (Sayer, 172), the court said that when an attorney has commenced a suit upon the credit of his client, he ought to proceed in it, although the client does not bring him money every time he applies for it. In *Hoby v.*

Built (3 Barn. & Ad. 350), held the jury were properly directed to find for plaintiff if they thought defendant had not given reasonable notice to the client of his intention to abandon the cause. And see *Van Sandau v. Brown*, 9 Bing 402; *Heslop v. Metcalfe*, 8 Sim. 622; *Love v. Hall*, 3 Yerg. 408; *Tenny v. Berger*, 93 N. Y. 528.

¹ *Fitch v. Scott*, 3 How. [Miss.], 314; *Ridley v. Tiplady*, 20 Beav. 44; *Frankland v. Cole*, 2 Cr. & J. 590.

² *Evans v. Watrous*, 2 Porter, 205. In England, it is clearly established that a counsel may, in his discretion, consent to a nonsuit (*Lynch v. Cowell*, 12 Law Times, N. S. 548; *Chown v. Parrot*, 14 C. B. N. S. 74; *Swinfen v. Chelmsford*, 5 Hurlst. & N. 890; *Swinfen v. Swinfen*, 1 C. B. N. S. 364, 400). See § 571, *post*.

³ *Gleason v. Clark*, 9 Cow. 57; see *Gaillard v. Smart*, 6 Id. 385.

⁴ *Godefroy v. Jay*, 7 Bing. 413;

for omitting to defend, if he has not been instructed in the defense.⁵ He will not be liable for neglect to file a plea, when instructed to do so merely for delay,⁶ and will be liable only for nominal damages, at least, if he can show that the defense he was employed to make was not a good one.⁷ As to the conduct of the trial, it is an attorney's duty to have the requisite witnesses in court,⁸ and to attend the trial at the time appointed,⁹ and at any stage of the cause where his presence may be requisite.¹⁰ But an attorney is not answerable for the absence, neglect, or want of attention of the counsel he has retained.¹¹ Negligence may consist in unskillfully administering interrogatories for examination in chief of an adverse witness already examined on the other side.¹² Counsel may waive objections to evidence, and stipulate for the admission of facts

see *People v. Lamborn*, 1 Scam. 123. In attorney's action for services in prosecuting a suit, defendant may counterclaim for loss from the attorney's negligence in allowing the vacating of his attachment upon motion by default, it appearing that the execution issued upon the judgment recovered in the action was returned unsatisfied (*Whitelegge v. De Witt*, 12 Daly, 319).

⁵ *Benton v. Craig*, 2 Mo. 198; *Salisbury v. Gourgas*, 10 Metc. 442.

⁶ *Johnson v. Alston*, 1 Camp. 176; *Pierce v. Blake*, 2 Salk. 515; see *Vincent v. Groome*, 1 Chitty, 182; *Anon.*, 1 Wend. 108; *Gilbert v. Williams*, 8 Mass. 51.

⁷ *Grayson v. Wilkinson*, 5 Smedes & M. 268. To make an attorney liable for not setting up in defense facts communicated to him by his client, the facts must be proved, or it must appear that they could have been proved (*Hastings v. Halleck*, 13 Cal. 203). A plaintiff's attorney is not liable for negligence in conducting a suit against excise officers for a seizure, if it appears that such seizure was lawful (*Aitcheson v. Madock, Peake*, 162).

⁸ *Reece v. Righy*, 4 Barn. & Ald.

202; see *Price v. Bullen*, 3 Law J. [K. B.], 39.

⁹ *Nash v. Swinburne*, 3 Man. & G. 630; *De Roufigny v. Peale*, 3 Taunt. 484; see *Dax v. Ward*, 1 Stark. 409. Under a joint contract made by a client with three attorneys, who agree to render him services in a number of suits as attorneys and counsel, it is not necessary that all the attorneys should be present and participate in the trial of each of the actions, if on consultation they determine that the presence of one of them can be dispensed with (*Phillips v. Edsall*, 127 Ill. 535; 20 N. E. 801).

¹⁰ *Dauntley v. Hyde*, 6 Jur. 133; or before an arbitrator in case of reference (*Swannell v. Ellis*, 1 Bing. 347; *Aitcheson v. Madock, Peake*, 163).

¹¹ *Birkbeck v. Stafford*, 14 Abb. Pr. 285; *Power v. Kent*, 1 Cow. 211; *Whitney v. Merchants' Ex. Co.*, 104 Mass. 152; *Morgan v. Roberts*, 38 Ill. 65; *Floyd v. Nangle*, 3 Atk. 568; *Norton v. Cooper*, 3 Sm. & Giff. 375; *Bickford v. Darcy*, L. R. 1 Ex. 554. See also *Lowry v. Guilford*, 5 Carr. & P. 234.

¹² See *Stokes v. Trumper*, 2 Kay & J. 232.

on the trial.¹³ It is well settled in England, that a counsel may consent to a nonsuit, or withdraw a juror, at the trial, if the interests of the client seem to require that course.¹⁴

§ 570. Obligation to take collateral proceedings.—An attorney who neglects to take proper precautions consequent upon a material fact affecting his client's interests in a business pending, such, for example, as the death, marriage, or insolvency of a party, express notice of which is brought home to him, seems clearly guilty of negligence.¹ It is the attorney's duty to set aside irregular proceedings prejudicial to his client.² And it is held that, being charged with the collection of a demand, he is bound to defend a replevin suit brought to obtain, the possession of a debtor's property which he had caused to be attached, and is responsible for negligence in the defense.³ So it is his duty to see that the recognizances entered into by a receiver in the action, are in proper form.⁴ and to sue out proper process against bail,⁵ or against an officer taking insufficient bail, or not delivering over the bail bond.⁶

¹³ *Alton v. Gilmanton*, 2 N. H. 520; *Talbot v. McGee*, 4 T. B. Monr. 375.

¹⁴ *Swinfen v. Chelmsford*, 5 Hurlst. & N. 890; *Swinfen v. Swinfen*, 1 C. B. N. S. 364, 400. But in the last case, *Crowder, J.*, said: "But I am not aware that any counsel engaged in making terms ever supposed for a moment that his opponent had power to bind his client without express instruction. Each acts upon the assumption that his adversary has his client's special authority to enter into the arrangement, which otherwise could not be concluded. If, therefore, in any such case, a counsel, under a misapprehension of his client's instructions, and believing himself to have authority, acts in fact without it, he cannot, in my opinion, bind his client."

¹ *Standard v. Ullithorne*, 10 Bing. 491; 4 *Moore & S.* 359; *Jacaud v. French*, 12 East, 317.

² *Godefroy v. Jay*, 7 Bing. 413.

³ *Smallwood v. Norton*, 20 Me. 83.

And in such a suit it is not competent for him to show, in reduction of damages, that the plaintiff in replevin was the real owner of the property (*Ib.*). Compare *Pennington v. Yell*, 11 Ark. 212. But it is not his duty to look up property of the debtor fraudulently disposed of, nor to institute collateral proceedings with reference to such property, unless he has contracted so to do it (*Morgan v. Giddings* [Tex.], 1 S. W. 369).

⁴ *Simmons v. Rose*, 31 Beav. 1. In that case, a solicitor represented to the court that a receiver then appointed had entered into the usual recognizances, which was not, in fact, true; the solicitor was held liable for defendant's loss in consequence of the receiver's liability being only in the nature of a simple contract debt.

⁵ *Dearborn v. Dearborn*, 15 Mass. 316.

⁶ *Simmons v. Bradford*, 15 Mass. 82; *Crooker v. Hutchison*, 1 Vt. 73.

§ 571. [consolidated with § 569.]

§ 572. Proceedings after trial. — An attorney's retainer to prosecute a suit authorizes him to conduct it to final judgment, and execution.¹ He will be liable, therefore, for not duly entering up judgment,² or for entering an irregular judgment,³ or for not charging the defendant in execution,⁴ if it is for the benefit of his client to do so,⁵ or for not seasonably suing out *scire facias* against bail,⁶ or for delaying to deliver an execution to the officer, whereby the right to issue an attachment is

¹ *Brackenbury v. Pell*, 12 East, 588 (per Lord Ellenborough); *Lawrence v. Harrison*, Styles, 426.

² *Flower v. Bolingbroke*, 1 Str. 639.

³ *Von Wallhoffen v. Newcombe*, 10 Hun, 236. That was an action by client to recover from attorney sum paid him, by agreement, for procuring a divorce judgment, afterwards set aside as irregular, and for damages for malpractice. Held, plaintiff was entitled to recover the money; and, as the judgment had been opened on account of the ignorance and negligence of the defendant, plaintiff was also entitled to recover damages.

⁴ *Russell v. Palmer*, 2 Wils. 325; *Russell v. Stewart*, 3 Burr. 1787; *Pitt v. Yalden*, 4 Id. 2060; *Lee v. Ayrton*, Peake, 119. An attorney's duty does not terminate when he recovers a judgment, but he must, without further instruction, proceed to obtain the fruits of the recovery, by making the judgment, by registration, a charge on the debtor's lands (*Hett v. Pun Pong*, 18 Can. S. C. 290). But an attorney is not bound to attend personally to the levy of an execution (*Williams v. Reed*, 3 Mason, 405), or to search for property (*Pennington v. Yell*, 12 Ark. 212; *Ray v. Birdseye*, 5 Denio 619; *aff'g s. c.*, 4 Hill, 158.)

⁵ To maintain an action for negligence against an attorney for not

issuing an execution on verdict obtained for his client, he deeming it not desirable to do so, there must be some evidence that it was desirable or for the benefit of plaintiff to do so; or that he did not make due inquiry whether the debtor could pay. In such a case, the attorney is liable for the amount, if any, which the jury think execution would have realized for his client (*Harrington v. Binns*, 3 Fost. & F. 942). If he doubts the expediency of further proceeding, he should give notice to his client, and request specific instructions (*Dearborn v. Dearborn*, 15 Mass. 316).

⁶ *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 1 Vt. 73; see *Simmons v. Bradford*, 15 Mass. 82. It is said that when an attorney undertakes the collection of debt, it becomes his duty to sue out all processes, both mesne and final, necessary to effect that object; and not only the first execution, but all such as may become necessary. He is bound also to pursue bail, and those who may have become bound with the defendant in the progress of the suit, either before or after judgment. But he is not bound to institute new collateral suits without special instructions, such as actions against the sheriff for a failure of his duty (*Pennington v. Yell*, 11 Ark. 212).

lost.⁷ An attorney is liable for not giving notice of the putting in of bail that proves insufficient, the debtor having absconded and the debt lost.⁸ Although an attorney is not bound to move for a new trial upon a point of law,⁹ yet if, in undertaking to obtain a new trial to which his client is entitled, he conducts the proceedings so negligently that the order granting the same is reversed on appeal, he is liable for the loss sustained thereby.¹⁰ Providing an undertaking on appeal is not a professional duty which an attorney owes to his client.¹¹ It has been held that he may waive his client's right of appeal,¹² but this has been denied.¹³

§ 573. Compromising suit or judgment.—In England, a defendant's attorney has been held not guilty of actionable negligence in compromising without his client's consent, provided he acts in good faith and with reasonable care and skill, and the compromise is for the benefit of his client, and is not made in defiance of his express prohibition.¹ In this country, the powers of an attorney are more restricted. Without special authority, he cannot settle a suit so as to conclude his client in relation to the subject in litigation;² and he acts at

⁷ *Phillips v. Bridge*, 11 Mass. 246 ; see *Pitt v. Yalden*, 4 Burr. 2060 ; *Russell v. Palmer*, 2 Wils. 325.

⁸ *McWilliams v. Hopkins*, 4 Rawle, 382 ; see *Simmons v. Bradford*, 15 Mass. 82.

⁹ *Hastings v. Halleck*, 13 Cal. 304.

¹⁰ *Drais v. Hogan*, 50 Cal. 121 ; see *Phillips v. Edsall*, 127 Ill. 535 ; 20 N. E. 801 [not preparing exceptions].

¹¹ *Churchill v. Brooklyn Life Ins. Co.*, 92 N. C. 485.

¹² See *Union Bank v. Geary*, 5 Pet. 99 ; *Pike v. Emerson*, 5 N. H. 393.

¹³ *People v. New York*, 11 Abb. Pr. 66.

¹ *Chown v. Parrot*, 14 C. B. N. S. 74 ; see *Prestwich v. Poley*, 18 Id. 806 ; *Lynch v. Cowell*, 12 Law Times, N. S. 548 ; *Strauss v. Francis*, L. R. 1 Q. B. 379.

² "Counsel may make arrangements concerning the progress of the

cause, without any special authority from the client ; but they cannot settle the suit, and conclude the client in relation to the subject in litigation, without his consent" (per Bronson, C. J., *Shaw v. Kidder*, 2 How. Pr. 244). In *Holker v. Parker* (7 Cranch, 436), Marshall, C. J., said : "Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case." He may discontinue a suit, where the client's rights are not concluded (*Gaillard v. Smart*, 6 Cow. 385 ; but see *Evans v. Watrous*, 2 Porter [Ala.], 205). An attorney has no power to

his peril in waiving a judgment in favor of his client.³ It is well settled that an attorney who has prosecuted a suit to judgment cannot, by virtue of his general authority, discharge a defendant without the actual payment of the debt⁴ in full,⁵ and in current money.⁶

§ 574. Negligence in conveyancing and searching titles. —

An attorney is also liable to his client for the consequences of his negligence and ignorance in matters not in litigation, such as the drafting of conveyances and other instruments,¹ and the

release sureties (*Givens v. Briscoe*, 3 J. J. Marsh. 532), nor to enter a *retraxit* (*Lambert v. Sandford*, 2 Blackf. 137), nor to release a witness (*Marshall v. Nagel*, 1 Bailey, 308; *Bowne v. Hyde*, 6 Barb. 392). An authority to sue the maker of a note, does not empower the attorney to release an endorser, without satisfaction or consent of client (*East River Bank v. Kennedy*, 9 Bosw. 543).

³ *Clussman v. Merkel*, 3 Bosw. 402; see *Anon.*, 1 Wend. 108. An attorney's authority is determined on final judgment (*Macbeath v. Ellis*, 4 Bing. 578).

⁴ *Beers v. Hendrickson*, 45 N. Y. 665; *Simonton v. Barrell*, 21 Wend. 362; *Vail v. Jackson*, 15 Vt. 314; see *Hopkins v. Willard*, 14 Id. 474; *Kellogg v. Gilbert*, 10 Johns. 220; *Gullett v. Lewis*, 3 Stew. 23; *Carter v. Talcott*, 10 Vt. 471; *Kirk v. Glover*, 5 Stew. & Port. 340; *Tankersly v. Anderson*, 4 Desaus. 45.

⁵ *Langdon v. Potter*, 13 Mass. 319; *Lewis v. Gamage*, 1 Pick. 347; *Brackett v. Norton*, 4 Conn. 517; *Gray v. Wass*, 1 Greenl. 257; *Erwin v. Blake*, 8 Pet. 18; *Hudson v. Johnson*, 1 Wash. 10; *Jackson v. Bartlett*, 8 Johns. 361; *Savoy v. Chapman*, 11 Ad. & El. 829.

⁶ He cannot take anything but money (*Treasurers, etc. v. McDowell*, 1 Hill [S. C.], 184; *Commissioners, etc. v. Rose*, 1 Desaus. 469). He

cannot receive the notes of a third person in payment or as collateral security (*Jeter v. Haviland*, 24 Ga. 252). Under general authority to collect a note, an attorney has authority to receive a payment of part in money, and the residue in a note at two or three days, of a person of undoubted responsibility (*Livingston v. Radcliff*, 6 Barb. 201). "An attorney has no power to make a compromise by which land is to be taken instead of money" (*Huston v. Mitchell*, 14 Serg. & R. 307). If an attorney takes payment in a depreciated currency, he is liable for the amount of the depreciation (*Trumbull v. Nicholson*, 27 Ill. 149), though not, if this is the only currency in circulation, and he has received no instructions to the contrary (*Pidgeon v. Williams*, 21 Gratt. 251 [Confederate notes]).

¹ Thus an attorney is liable for negligence in drafting the form of an attestation of an instrument (*Elkington v. Holland*, 9 Mees. & W. 659); or in omitting a seal where necessary (*Parker v. Rolls*, 14 C. B. 691); or in drawing a mortgage to omit a release of dower (*White v. Reagan*, 32 Ark. 281). See *Cummings v. Bannon* [Md.], 8 Atl. 357 [mistake in drawing lease]. A solicitor may be guilty of negligence in respect to a deed as to make him liable to his client, notwithstanding that the

proper recording of the same² or allowing his client to execute a deed with an improper covenant,³ and particularly the searching the title of property offered to his client for purchase, or as security for a loan. An attorney who certifies a title to be perfect, or that the property is unincumbered, when in fact there is a palpable cloud upon the title, or an incumbrance upon the property which a reasonably careful search would have disclosed, is liable for any loss to his client in consequence of his accepting the title in reliance upon such certificate.⁴ On the other hand, an examiner of a title is not an indemnitor.⁵ If he discovers a matter the effect of which on the title involves a question of law, he is only bound, in deciding it, to exercise a reasonable degree of prudence and learning.⁶ The attorney is liable for his negligence in certifying to a title to his immediate employer only, and not to the

deed professes to have been settled by the court (*Stanford v. Roberts*, L. R. 26 Ch. Div. 155).

² *Arnold v. Robertson*, 3 Daly, 298; *Miller v. Wilson*, 24 Pa. St. 114; *Stott v. Harrison*, 73 Ind. 17; *Dwyer v. Woulfe*, 40 La. Ann. 46; 3 So. 360 [neglect to seasonably register a mortgage]; *Lynch v. Wilson*, 22 Upper Canada [Q. B.], 226. See *Fenaille v. Coudert*, 44 N. J. Law, 286.

³ *Stannard v. Ulithorne*, 10 Bing. 491. Solicitor is liable if he neglects his duty of explaining the effect of a bill of sale to the grantor (*Matter of Haynes*, L. R. 15 Ch. Div. 52).

⁴ *Howell v. Young*, 5 Barn. & C. 259; *Watson v. Muirhead*, 57 Pa. St. 161; *Miller v. Wilson*, 24 Id. 114; *Clark v. Marshall*, 34 Mo. 429 [incorrect abstract of record of quantity of land]; *Rankin v. Schaeffer*, 4 Mo. App. 108; *Roberts v. Sterling*, Id. 593; *Chase v. Heaney*, 70 Ill. 268; *Batty v. Fout*, 54 Ind. 482; *Thomas v. Schee*, 80 Iowa, 237; 45 N. W. 539; see *Gore v. Brazier*, 3 Mass. 543; *Hamilton v. Cutts*, 4 Id. 349; *Sprague v. Baker*, 17 Id. 586. *Byrnes*

v. Palmer, 18 N. Y. App. Div. 1 [failure to correctly read a release]. It is no defense that a lien not reported was erroneous or of doubtful value (*Gilman v. Hovey*, 26 Mo. 280). A bill in equity will not lie against a solicitor for negligence in investigating a title, and compel him to take the mortgage security off his client's hands (*British Mutual Investment Co. v. Cobbold*, L. R. 19 Eq. 627).

⁵ *Rankin v. Schaeffer*, 4 Mo. App. 108.

⁶ *Watson v. Muirhead*, 57 Pa. St. 161; *Ireson v. Pearman*, 3 Barn. & Cr. 799; *Brooks v. Day*, Dick. 572; *Brown v. Howard*, 4 J. B. Moore, 508; *Knights v. Quarles*, 2 Brod. & B. 202; *Pitman v. Francis*, 1 Cab. & E. 355. In England, an attorney, though not responsible for his opinion as to a doubtful title, especially if he consults counsel, he is bound to examine fully the title deeds, and, if he consults counsel, to lay the whole state of the title before him. Not doing so, he is guilty of negligence (*Wilson v. Tucker*, 3 Stark. 154).

latter's assigns or any third person, between whom and the attorney there is no privity.⁷

§ 575. **Negligence in keeping and investing money.**—An attorney who collects money for clients is bound to deposit such money safely apart from his own funds; and, if he mixes it with his private account in bank, he is responsible absolutely for it. But if he keeps it separate in a bank of good repute, he is not liable, in case of the bank's failure;¹ provided always that the deposit is placed to the credit of his client, or is so distinguished on the books of the bank as to indicate, in some way, that it is his client's money.² An attorney employed to invest money on security is liable, if, through want of ordinary skill and prudence, the security turns out to be invalid or insufficient.³ Under ordinary circumstances, the lender's attorney is only bound to see that the security is *legally* sufficient for the stipulated purpose, and is not bound to inquire into the sufficiency, in point of *value*, of the security offered, or of the personal responsibility of the borrower.⁴

§ 576. **Liability for disclosing privileged communications.**—An attorney, professionally intrusted with the secrets of his client, is liable for discovering those secrets to an opponent. Thus, where an attorney for the defendant assisted the plaintiff in obtaining execution against his client, he was held liable in damages,¹ and so where a solicitor, being employed to raise money on mortgage, disclosed to the proposed lender certain

¹ *Dundee Mortgage Co. v. Hughes*, 10 Sawyer, 144. S. P., *Savings Bank v. Ward*, 100 U. S. 195.

² *Pidgeon v. Williams*, 21 Gratt. 251.

³ *Pidgeon v. Williams*, *supra*; *Naltner v. Dolan*, 108 Ind. 500; 8 N. E. 289. In the last case, the attorney deposited in good faith, but in his own name, money collected for a client, in a bank in good standing. Although the money was not mingled with his own funds, and although the transmission of the money collected was prevented by garnishee process, soon after its deposit in bank, and before an oppor-

tunity had been presented to send it to the client, he was held liable for the loss of the deposit, through the bank's failure.

⁴ *Savings Bank v. Ward*, 100 U. S. 195; *Donaldson v. Haldane*, 7 Clark & F. 762; *Brown v. Howard*, 4 J. B. Moore, 508; *Dartnall v. Howard*, 4 Barn. & Cr. 345; *Hayne v. Rhodes*, 8 Q. B. 342. See *Whitehead v. Greetham*, 2 Bing. 464; *Watts v. Porter*, 3 El. & Bl. 743; *Craig v. Watson*, 8 Beav. 427.

⁵ See *Green v. Dixon*, 1 Jur. 137; *Howell v. Young*, 5 Barn. & Cr. 259; *Dartnell v. Howard*, 4 Id. 345.

⁶ *Lawrence v. Harrison*, Styles, 426.

defects in his client's title, by reason of which the latter was put to the expense of a litigation, was delayed in obtaining the money, and was compelled afterward to give a higher rate of interest, the solicitor was held liable, notwithstanding he had been attorney for the proposed lender.² An attorney, however, is not liable for disclosing in evidence circumstances not confidentially communicated,³ as, for example, the execution of a deed,⁴ or a non-professional conversation with his client after judgment.⁵ But the disclosure of a privileged communication is actionable, though not made in an action, but made in the course of a private negotiation, wherein the attorney's services were retained.⁶

§ 577. **Liability for partners or agents.**—The unskillfulness of either of two attorneys who are in partnership is a good defense to a claim by the firm for services. And both partners are liable for the negligence of one of them in conducting a suit as sole attorney of record.¹ Nor will a retiring partner be relieved from liability for the firm's negligence by a dissolution of the firm.² An attorney is liable for the negligence of another attorney in whose hands he placed his client's claim;³ and of course he is responsible for the negligence of his own clerks.

² Taylor v. Blacklow, 3 Bing. N. C. 235 ; 3 Scott, 614.

³ See Walker v. Wildman, 6 Madd. 47 ; Bramwell v. Lucas, 2 Barn. & Cr. 745.

⁴ Bull, N. P. 284.

⁵ See Cobden v. Kendrick, 4 T. R. 431.

⁶ See Greenough v. Gaskell, 1 Myl. & K. 98 ; Pulling on Attorneys, 3d ed. 225.

¹ Warner v. Griswold, 8 Wend. 665 ; Livingston v. Cox, 6 Pa. St. 360.

² Cholmondeley v. Clinton 19 Ves. Jr. 261 ; Cook v. Rhodes, Id. 273, note. Trust money was sent for investment on mortgage to A., one of a firm of solicitors, who was himself one of two trustees. The money was paid into the bankers to the account of the firm, and was afterward drawn out by A., and never in-

vested ; Held, that the other member of the firm was liable (Eager v. Barnes, 31 Beav. 579). See Arden v. Tucker, 4 Barn. & Ad. 815 ; Kell v. Nainby, 10 Barn. & Cr. 20 ; Perrin v. Hill, 2 Jurist, 858 ; Ward v. Lee, 13 Wend. 41 ; McFarland v. Crary, 6 Id. 297 ; aff'g 8 Cow. 253. In Ayrault v. Chamberlin (26 Barb. 83), after the commencement of a foreclosure suit, A. and B., being plaintiff's attorneys, A. retired, and the suit was continued by B. and C. During the progress of the suit, C. retired ; and a year afterward B. collected the money and embezzled it. Held, that C. was not liable.

³ Walker v. Stevens, 79 Ill. 193. See Bradstreet v. Erverson, 72 Pa. St. 124. But compare Singer v. Steele, 24 Ill. App. 58.

CHAPTER XXV.

BANKERS AND BILL COLLECTORS.

§ 578. Who are bankers.	§ 584. Personal liability of sub-agents.
579. Obligation to use care.	585. Collection by notary.
580. Duty to present bill for payment or acceptance.	586. Who may sue for banker's negligence.
580a. Duty to remit proceeds of collection.	587. Banker not bound to sue upon paper.
581. Duty to give notice of dishonor of bill.	587a. Burden of proof.
582. Liability for negligence of sub-agents.	588. Special deposits.
583. Exceptions to the rule.	589. Liability of directors.

§ 578. **Who are bankers.**— Commercial paper being for the most part collected through banks, it is usual to treat of the proper method of making such collections with special reference to bankers, although there are other classes of collecting agents. We have therefore chosen this title under which to state the duties and liabilities appertaining to the collecting business, and use the word “bankers” as inclusive of the entire class of collecting agents conducting an independent business as such.¹

§ 579. **Obligation to use care.**— The obligations hereinafter stated are founded upon the recognized customs and necessities of business, and arise from the mere fact of the acceptance of paper for collection. No express contract is necessary; nor is it even material that the banker should receive or be entitled to receive any special compensation for the service. The fact that a banker receiving paper for collection may reasonably expect that, according to the usual course of business, the pro-

¹Collecting commercial paper being a part of the regular business of banking, a national bank will be liable for negligence in collecting a draft, the same as any other bank or agent (Exch. Nat. Bank v. Third Nat. Bank, 112 U. S. 276; 5 S. Ct. 131; Mound City Paint Co. v. Commercial Nat. Bank, 4 Utah, 353; 9 Pac. 709).

ceeds may lie in his hands for a longer or shorter time, is a sufficient consideration to raise an implied undertaking to collect in the ordinary manner.¹ One not engaged in business as a collecting agent, or holding himself out as such, but who undertakes gratuitously, at the request of a friend, to collect a debt for him, is only liable for gross negligence, or failure to make an honest effort according to his capacity.²

§ 580. Duty to present bill for payment or acceptance. —

A banker or other agent who receives negotiable paper for collection¹ is bound to use ordinary diligence in presenting it, so as to secure the rights of the owner of the paper against all the parties thereto;² and he is liable for all the loss suffered by his

¹Smedes v. Utica Bank, 20 Johns. 372; aff'd 3 Cow. 662; Bank of Utica v. McKinster, 11 Wend. 473; aff'g 9 Id. 46; see Curtis v. Leavitt, 15 N. Y. 9, 167. But compare First Nat. Bank v. Sprague, 34 Neb. 318; 51 N. W. 846 (note 19, § 582, *post*). Where conversion of a note by defendant is charged, it is of course unnecessary to allege and prove that he undertook its collection for a consideration (Keyes v. Bank of Hardin, 52 Mo. App. 323).

²Nixon v. Bogin, 26 S. C. 611; 2 S. E. 302. In Kinchelo v. Priest (89 Mo. 240; 1 S. W. 235), plaintiff, on leaving the state, left notes for collection with a farmer, who did not assume to act as a collecting agent, and who acted gratuitously, and made efforts to collect, but let the notes outlaw before suing the maker. The court charged that he was required to use the same degree of care that an ordinarily prudent man would have used in his own business. Held, that the charge was favorable to the bailor, and a verdict for the bailee would not be disturbed.

¹Defendant's cashier placed his own indorsed note in the private envelope of a depositor, in the vault of the defendant's bank, as collateral

security for his individual note to the depositor. Held, the bank not liable for release of the indorser by failure to present the note for payment, and to notify the indorser of nonpayment; the note being merely a special deposit with the bank, and constructively in the depositor's possession (Bohl v. Carson, 63 Fed. 26; 11 C. C. A. 16).

²By failing to demand payment of a note or bill left with it for collection, a bank makes the note or bill its own, and becomes liable to the owner for the amount (Bank of Washington v. Triplett, 1 Pet. 25; McKinster v. Bank of Utica, 9 Wend. 46; Tyson v. State Bank, 6 Blackf. 225; Branch Bank v. Knox, 1 Ala. 148; see Bank of Mobile v. Huggins, 3 Id. 206). But where the necessity of a particular presentment is not judicially settled, the agent is not liable for his mistaken view of the law, *e. g.*, where the question whether banks were entitled to grace on their post-notes had never been decided, and there was no uniform practice as to demanding payment of such notes, and giving notice to the indorsers after the promisor failed (Mechanics' Bank v. Merchants' Bank, 6 Metc. 19). It is

principal in consequence of his neglect to do so,³ even though his omission was caused by his mistaking the date on the paper, if the true date could have been ascertained by the use of ordinary care.⁴ If it is payable at sight, or if no time of payment is specified by its terms, he should present it for payment upon the same day that he receives it, if by the use of ordinary diligence he can do so;⁵ although presentment the day after it is received is sufficient.⁶ On the other hand, it is negligence to present negotiable paper for payment too soon, *e. g.*, before the expiration of grace.⁷ If there is any reason (not appearing on its face) why a draft payable on demand should not be presented at once, the payee should give instructions as to the time of collection.⁸ A bill of exchange payable at a future day must be presented immediately for acceptance, no matter whether it requires an acceptance to fix the time of its payment or not;⁹ and if such acceptance is refused, notice

negligence for an agent expecting a draft at his office for the benefit of his principal, to leave his office for several days together, without empowering some one to open letters and present the draft, in case of its arrival during his absence (*Brady v. Little Miami R. Co.*, 34 Barb. 249). The agent's fault in losing a draft, if it leads to a failure of presentment or notice where necessary, makes him liable for the amount of the bill (*Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641). A banker cannot be charged with negligence for any act which he did with the concurrence of his principal (*Jacobsohn v. Belmont*, 7 Bosw. 14).

³ Cases cited under § 587*a*, *post*.

⁴ *Bank of Delaware Co. v. Broomhall*, 38 Pa. St. 135.

⁵ *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Morris v. Eufaula*, 106 Ala. 383; 18 So. 11.

⁶ *Kelty v. Second National Bank*, 52 Barb. 328; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Mohawk Bank v. Broderick*, 13 Id. 133.

⁷ *Ivory v. Bank of Missouri*, 36 Mo.

475. There held that bank could not urge that it was not accustomed to undertake collections, and that its mistake arose from its want of familiarity with the ordinary course of proceedings.

⁸ Plaintiff left with defendant a certificate of deposit "for collection when due," and took a receipt therefor showing the date, maker's name, amount, rate of interest, and maturity, but gave no instructions as to the time of collection, and was not informed by the defendant as to the usual course of business in such cases. The certificate was in fact payable on demand, but to draw interest only if held until maturity. Defendant collected its face amount, and paid the same to plaintiff. Held, that defendant was not guilty of either negligence or violation of instructions, in not collecting interest and was not liable therefor (*Ide v. Bremer Co. Bank*, 73 Iowa, 58; 34 N. W. 749).

⁹ This is a matter of course when the bill is by its terms payable at a certain time after sight, since, other-

thereof must be given, in the same manner as when payment is refused at the maturity of a bill. If for any reason the parties to the instrument are chargeable with notice of its dishonor, without its presentment, or if they have all waived such presentment, and it would have been a useless form to present it, the collecting agent is not liable for omitting to do so.¹⁰ Ordinarily, a bill should be presented for payment to the drawee at the place named in the bill, or, if not named, at his place of business; but where another place or method of collection is contemplated by both principal and agent, *e. g.*, collecting a check through a clearing-house, the agent's duty does not extend further than to so present it.¹¹

§ 580a. Duty to remit proceeds of collection. — There is an implied understanding that the established usage in making collections will be followed. When, therefore, a collecting agent, acting according to such usage, and with due care, accepts from the debtor in payment of his obligation his check on a bank in another place, he is not liable to his principal for the amount of the collection, if the drawer of the check

wise, presentment might be delayed indefinitely (*Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; see *Commercial Bank v. Union Bank*, 11 Id. 203). But it is equally required when the bill is payable at a specified day, or at a certain term after its date (*Walker v. Bank of State of N. Y.*, 9 N. Y. 582). A banker is justified in leaving a bill twenty-four hours for acceptance; and if business hours on the next day close before the lapse of twenty-four hours, he is not necessarily bound to *insist* upon the return of the bill on that day (*Bank of Van Dieman's Land v. Bank of Victoria*, L. R. 3 P. C. 526, 547). As to the duty of agent to hold bills of lading attached to accepted time draft, until it is paid, see *Second Nat. Bank v. Cummings*, 89 Tenn. 609; 18 S. W. 115, and *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99; 10 So. 407 [sight draft].

¹⁰ There is no liability, where presentment was not necessary to charge the parties, and would have been useless if made (*Mobley v. Clark*, 28 Barb. 390).

¹¹ *Prima facie*, the duty of a clearing-house agent extends no further than to present checks for payment to the clearing-house; and, in the absence of special facts and circumstances, it owes no duty to present it to the bank on which it is drawn (*Farmers', etc. Bank v. Third Nat. Bank*, 165 Pa. St. 500; 30 Atl. 1008). In that case, held, also, not negligence for a clearing-house agent to omit to send to the clearing-house on Saturday a check on a bank which was closed on Friday, the agent having no knowledge or means of knowledge that the bank would resume payment on Saturday, and the clearings having been made on Saturday before the bank opened.

becomes insolvent before it can be presented.¹ So he is not liable for a collection made by his apparently responsible sub-agent, which the latter in the usual course of business remitted to him by his draft, and which the latter sent to his principal at the place of payment, and both drawer and drawee failed before it could be presented.² A bill in the hands of an agent for collection, as likewise the proceeds, remain the property of the principal, and the agent is invested with the title to neither, even where he has remitted to him on general account, in anticipation of collection.³ He cannot, therefore, set off a claim of his own against the money collected,⁴ nor can he abate anything from the amount due on the bill.⁵

§ 581. Duty to give notice of dishonor of bill. — It is universally held to be the duty of a collecting agent to give timely notice to his principal of the dishonor of a negotiable instrument.¹ By unreasonably delaying to do so, he may make

¹*Farmers' Bank v. Newland*, 97 Ky. 464; 31 S. W. 38. To same effect, *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118; 19 Atl. 55 [plaintiff's telling agent to hold the dishonored check a few days, held a condonation]. A check given by the drawee to the agent on presentation of the draft, being only conditional payment, leaving the drawer of the check liable to the drawer of the draft, where the bank on which the check was drawn failed before the check was presented, payment thereafter by the drawer of the check to the collecting bank of the amount of his debt will not prevent his suing the collecting bank for failure to make timely presentment of the check (*Morris v. Eufaula Nat. Bank*, 106 Ala. 383; 18 So. 11).

²*St. Nicholas Bank v. State Nat. Bank*, 59 Hun, 383; 12 N. Y. Supp. 864.

³*Dickerson v. Wason*, 47 N. Y. 439; *Nat. Park Bank v. Seaboard Bank*, 114 Id. 28; 20 N. E. 632; *Arnot v. Bingham*, 55 Hun, 553;

Bank of Clarke Co. v. Gilman, 81 Hun, 486; 30 N. Y. Supp. 1111.

⁴*Commercial Bank v. Rowland*, 31 Neb. 483; 48 N. W. 149.

⁵In *Bank of Scotland v. Dominion Bank* (L. R. [1891] App. Cas. 592), the agent accepted the offer of the acceptors of a bill to pay the bill and the protest charges on the condition that they should not be called upon to pay interest and expenses, and marked the bill "Paid" and delivered it to the acceptors, who deleted their names thereon. Thereafter, the holders refused to agree to the abatement, and refused to accept the sum tendered to them by the agent of the bank, and received back the bill canceled. The acceptors became bankrupt. Held, that the agent was liable for the amount of the bill, with interest, and for the expenses of the holders' action against the acceptors, but was entitled to an assignment of the rights of the holders against the drawers of the bill.

¹*Van Wart v. Wooley*, 3 Barn. & Cr. 439; *Wingate v. Mechanics'*

the obligation his own.² But in some states, it is further held to be the duty of bankers and other persons undertaking the collection of paper as a business to give notice of dishonor to all the parties liable to be charged on the instrument, in such manner and time as to charge them with their proper liability.³ For, although it would be sufficient for the protection of the

Bank, 10 Pa. St. 104. This is conceded in all the cases. The fact, however, that a bank after receiving a draft for collection, and after presenting it, and receiving a promise of payment, holds the same, according to its customary method of business, for 10 days, without notice to the drawer, during which time the drawee makes an assignment, does not, of itself, constitute actional negligence (*Sahlien v. Bank of Lonoke*, 90 Tenn. 221; 16 S. W. 373). See *Mound City Paint Co. v. Commercial Nat. Bank*, 4 Utah, 353; 9 Pac. 709 [delay of 47 days to notify drawer; agent liable].

² In *Wood River Bank v. First Nat. Bank* (36 Neb. 744; 55 N. W. 239), defendant bank received from a customer a check drawn on itself, with instructions to protest in case of nonpayment. The payor having no funds to his credit to meet it, defendant held the check for two days to enable him to provide funds. Held, defendant was bound to notify its customer not later than next day after dishonor, and a finding that it intended to accept the check, and become liable, was warranted. Compare *Crouse v. First Nat. Bank* (137 N. Y. 383; 33 N. E. 301), where it was held that (there being no question of holding other parties than the drawee), a week's delay in notifying the holder was not proof of negligence. In *Fahy v. Fargo* (61 Hun, 623; 17 N. Y. Supp. 344), plaintiff entrusted defendant with a draft for collection under instructions, if

it was not paid on first presentation, to retain it one day and then return it. Defendant in turn gave the draft to its agent who, at the drawee's request, kept it five days after first presentation, and then five days more; meantime the drawee made an assignment. It appearing that drawee had ample funds before the assignment, defendant was held liable as for negligence.

³ So held in New York (*Smedes v. Bank of Utica*, 20 Johns. 372; *aff'd*, 3 Cow. 662; *McKinster v. Bank of Utica*, 9 Wend. 46; *aff'd*, 11 Id. 473; *Allen v. Merchants' Bank*, 22 Id. 215; *Montgomery Co. Bank v. Albany Bank*, 7 N. Y. 459; *Walker v. Bank of State of N. Y.*, 9 Id. 582; *Coghlan v. Dinsmore*, 1 Abb. Ct. App. 375; *Shipsey v. Bowery Nat. Bank*, 36 N. Y. Superior, 501); in *Ohio* (*City Nat. Bank v. Clinton Nat. Bank*, 49 Ohio St. 351; 30 N. E. 958); in *Pennsylvania* (*West Branch Bank v. Fulmer*, 3 Pa. St. 399); in *Maryland* (*Exchange Bank v. Sutton Bank*, 78 Md. 577; 28 Atl. 563); in *Virginia* (*Roanoke Nat. Bank v. Hambrick*, 82 Va. 135); in *North Carolina* (*Bank of New Hanover v. Kenan*, 76 N. C. 340); in *South Carolina* (*Thompson v. Bank of S. C.*, 3 Hill, 77; *Riley*, 81); in *Alabama* (*Bank of Mobile v. Huggins*, 3 Ala. 206); in *Louisiana* (*Chavanne v. Frizola*, 25 La. Ann. 77); and in *Minnesota* (*Jagger v. German American Bank*, 53 Minn. 386; 55 N. W. 545; *West v. St. Paul Nat. Bank*, 54 Minn. 466; 56 N. W. 54).

principal that the agent should give notice to him alone, leaving him to notify the prior parties to the bill, and this even though the principal is himself only a collecting agent, yet it is the usage among bankers, when employed to collect negotiable paper, to give notice of dishonor to all the parties, in order to save the principal the trouble; and it may be assumed that such is the general custom among bill collectors. The principal has, therefore, a right to suppose that the agent has attended to this duty, and may hold him responsible for his neglect to do so. This custom is not recognized by the courts of Massachusetts; and it is, therefore, held in that state that a banker is not, except by special agreement, bound to give notice of the dishonor of negotiable paper intrusted to him for collection to any one except his immediate principal.⁴ Even under the New York rule, if the principal distinctly knew that the agent had neglected to give notice to a party to the instrument, he would not be at liberty to refrain from giving such notice, if not too late for him to do so, and to hold the agent liable for damage which might thus be obviated.

§ 582. **Liability for negligence of sub-agents.** — A banker or professional bill collector is not, properly speaking, the *agent* of a person depositing paper with him for collection, except to a limited extent. The two stand independent of each other. The relation of master and servant clearly does not exist between them; and the banker, although clothed with an authority from the owner of the instrument to demand and receive its value, is at liberty to choose his own method of collection, free from any control on the part of the owner. In analogy to the rule already stated with respect to independent contractors generally, persons employed by a banker to collect the paper of his customers, whether at home or at a distance, are clearly his agents, for whose acts he must answer to his customers as if they were his own. It makes no difference that the paper was collectible at such a distance from the banker's office that a customer would necessarily know that some agent must be employed to collect it, so long as the ultimate col-

⁴ *Phipps v. Millbury Bank*, 8 Metc. 180; *Bank of United States v. Goddard*, 5 Mason, 366.
79; and see *Colt v. Noble*, 5 Mass. 167; *Eagle Bank v. Chapin*, 3 Pick.

lecting agent is selected by the banker and not by the customer. This is well-settled law in New York,¹ New Jersey,² Pennsylvania,³ Georgia,⁴ Ohio,⁵ Michigan,⁶ Indiana,⁷ Kansas,⁸ Minnesota,⁹ Montana,¹⁰ Great Britain,¹¹ and, now, in all Federal courts of the United States;¹² although it had been supposed that the contrary rule had been adopted by the Federal courts.¹³ But owing to the uncertainty and confusion which at

¹ When a bank, or broker, or other dealer receives, upon good consideration, a note or bill for collection in the place where such bank, broker, or dealer carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent, either in the negotiation, collection, or paying over the money, by which the money is lost, or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied (*Allen v. Merchants' Bank*, 22 Wend. 215; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 Id. 203; *Ayrault v. Pacific Bank*, 47 Id. 570; *Weyerhauser v. Dun*, 100 Id. 150; 2 N. E. 274 [mercantile agency]). In *Palmer v. Holland* (51 N. Y. 416), held that an express company accepting commercial paper for collection at a place beyond its line, with directions to present it, and, in case of dishonor, to sue and collect immediately, is liable for the negligence of a connecting company to which it delivered the note as its agent.

² *Titus v. Mechanics' Nat. Bank*, 35 N. J. Law, 588.

³ *Wingate v. Mechanics' Bank*, 10 Pa. St. 104; *Bradstreet v. Everson*, 72 Id. 124; *Morgan v. Tener*, 83 Id. 305; *Siner v. Stearne*, 155 Id. 62; 25 Atl. 826.

⁴ *Bailie v. Augusta Savings Bank* 95 Ga. 277; 21 S. E. 717.

⁵ *Reeves v. State Bank*, 8 Ohio St. 465. A bank receiving for collection a draft which it transmits to another bank, and is thence sent to a third bank, cannot recover from the bank last receiving it for the latter's negligence in failing to make the collection (*First Nat. Bank v. Mansfield Sav. Bank*, 3 Ohio Dec. 141).

⁶ *Simpson v. Waldbury*, 63 Mich. 439; 30 N. W. Rep. 199; *Finch v. Karste*, 97 Mich. 20; 56 N. W. 123.

⁷ *Abbott v. Smith*, 4 Ind. 452; *Tyson v. State Bank*, 6 Blackf. 225.

⁸ *Bank of Lindsborg v. Ober*, 31 Kans. 599; 3 Pac. 324.

⁹ *Streissguth v. Nat. German-American Bank*, 43 Minn. 50; 44 N. W. 797; see *Borup v. Nininger*, 5 Minn. 523.

¹⁰ *Power v. First Nat. Bank*, 6 Mont. 251; 12 Pac. 597.

¹¹ *Van Wort v. Woolley*, 3 Barn. & C. 439; *Mackersy v. Ramseys*, 9 Cl. & Fin. 818.

¹² *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; 5 S. Ct. 141; *Tradesmen's Nat. Bank v. Third Nat. Bank*, 112 U. S. 293; 5 S. Ct. 149. See *Kent v. Dawson Bank*, 13 Blatch. 237.

¹³ In *Bank of Washington v. Triplett*, 1 Peters, 25. But the question was not before the court for decision; and the *dicta* to this effect in the opinion have been overruled by the same court in the *Exchange Bank* case (*supra*).

one time existed with respect to the liability of employers for the negligence of independent contractors, the courts of several states have established the opposite rule; especially in Massachusetts,¹⁴ Connecticut,¹⁵ Maryland,¹⁶ Illinois,¹⁷ Missouri,¹⁸ Nebraska,¹⁹ Tennessee,²⁰ Mississippi,²¹ Iowa,²² and Wisconsin.²³ In earlier editions of this work, long before the Supreme Court of the United States had overruled these latter decisions, we expressed our clear conviction that the courts had erred in making them. This error may have given rise to a usage in their respective states sufficiently general to warrant their adherence to the rule adopted by them, but, as an original proposition, it was certainly wrong. The argument by which

¹⁴ Bills of exchange, payable at distant places, and left with a bank for collection, are presumed to be intended to be transmitted to, and collected by, suitable sub-agents at the places where payable; since it cannot be expected that a bank will employ one of its own officers to journey about and collect such bills. In such case, therefore, as in case of bills expressly left with a bank for transmission only, if the bank in good faith employs suitable sub-agents for collection, it is not liable for their neglect or default (*Fabens v. Mercantile Bank*, 23 Pick. 330; *Dorchester Bank v. New England Bank*, 1 Cush. 177).

¹⁵ *Lawrence v. Stonington Bank*, 6 Conn. 521; *East Haddam Bank v. Scovil*, 12 Id. 303.

¹⁶ *Jackson v. Union Bank*, 6 Har. & Johns. 146.

¹⁷ *Ætna Insurance Co. v. Alton City Bank*, 25 Ill. 243; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343; 36 N. E. 1029; *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259; 41 N. E. 906; *Anderson v. Alton Nat. Bank*, 59 Ill. App. 587.

¹⁸ *Daly v. Butchers & Drovers' Bank*, 56 Mo. 94.

¹⁹ *First Nat. Bank v. Sprague*, 34 Neb. 318; 51 N. W. 846. In that

case, held that a bank which receives for collection a note or bill, payable at a distant point, with the understanding that such collection is an accommodation only, or that it shall receive no compensation therefor beyond the customary exchange, and transmits such paper to a reputable and suitable correspondent at the place of payment, with proper instructions for the collection and remittance of the proceeds thereof, will not be liable for the default of such correspondent in failing to remit, since the holder will be held to have assented to the employment of the correspondent, so as to make it his agent; and, moreover, the exchange usually charged by banks for the transmission of money from one place to another is not a sufficient consideration to support an implied undertaking to answer for the default of a correspondent (see note 24, *infra*).

²⁰ *Bank of Louisville v. First Nat. Bank*, 8 Baxter, 101.

²¹ *Third Nat. Bank v. Vicksburgh Bank*, 61 Miss. 112.

²² *Guelich v. Nat. State Bank*, 56 Iowa, 434; 9 N. W. 328.

²³ *Stacy v. Dane Co. Bank*, 12 Wisc. 629; *Vilas v. Bryants*, Id. 702.

it is supported, namely, that it cannot be expected that a banker will employ one of his own servants to collect bills at a distance, is of no weight. The banker is not expected in any case to give his personal attention to the collection of bills. Why then should he not escape liability for the acts of his immediate servants (for whose neglect he is confessedly responsible²⁴) as well as for the neglect of agents whom he employs at a distance? It is everywhere held that negligence in the selection of a sub-agent is actionable.²⁵

§ 583. **Exceptions to rule.** — When paper is deposited in a bank, avowedly for the mere purpose of transmission to another bank selected by the owner of the paper, and responsible to him, the former bank is, of course, not liable to him for

²⁴ If the bank employs one who is not a notary to give notice, and he neglects, the bank is liable (*Bellemire v. Bank of U. S.*, 4 Whart. 105; 1 Miles, 173). The question is fully discussed and the doctrine of the text maintained in 20 Am. L. Rev. 889. Mr. Daniel (1 Neg. Inst. 324), favors the New York rule, and so does Mr. Freeman (note to *Allen v. Merchants' Bank*, 34 Am. Dec. 315), and, apparently, Mr. Morse (*Banks, etc.*, § 276, 3d. ed.). Since our last edition, Nebraska, Minnesota, and Georgia have taken sides on this vexed question, the two latter in favor of the New York rule, and the former in favor of the Massachusetts rule. The Nebraska court in *First Nat. Bank v. Sprague* (34 Neb. 318; 51 N. W. 846), in making its choice, said: "Whatever may have been the reasons, arising out of the business methods existing at the time *Allen v. Merchants' Bank* (22 Wend. 215) was decided, for the rule adopted therein, the reason for such a rule is wanting in view of the present changed conditions. Banks, as a general rule, have now no facilities for making collections at distant points not enjoyed by the

business public at large. Formerly they may have enjoyed a monopoly of information relative to location, names and credits of banks at distant or remote points. To-day, however, business men, by means of the information derived from the press and the numerous directories at their command, may collect their bills through the medium of banks at the place of payment as cheaply, safely, and expeditiously as their local banks. . . . The theory that the advantage of exchange between different points is a sufficient inducement for banks to assume the liability sought to be imposed may be conceded so far as the inconvenience and cost of collection are concerned, but to us it seems wholly inadequate as a consideration for an implied undertaking to insure against loss on account of the fraud or insolvency of a correspondent."

²⁵ A mercantile agency undertaking to make collections throughout the country by means of local attorneys is answerable for the negligence of any attorney employed upon terms known only to itself (*Weyerhauser v. Dun*, 100 N. Y. 150; 2 N. E. 274).

the negligence of the other bank. The correspondent bank in this case becomes the direct agent of the holder; and the relation of principal and agent is not established between the two banks.¹ It has been held by an equally divided court in New York, that a collecting bank may properly send by mail a note to a bank at which, by its terms, it is made payable (there being no indorsers to be affected): such presentment amounting to nothing more than a request to pay the note, and that in surrendering the note and accepting a draft for the amount (by mail) which is dishonored, the collecting bank is not liable for the amount of the note as lost through negligence.² This doctrine is not accepted in Pennsylvania, where it is held that the rule requiring the bill to be sent to some suitable agent must, from the nature of the case, mean some one other than the party who is to make payment.³ So it is held that a bank or agent for collection of a certified check should not send such check to the certifying bank itself for payment. This would be putting the instrument in the hands of the party primarily liable, enabling him to destroy the evidence of debt and repudiate the transaction, and would show want of reasonable care.⁴ Otherwise, where the debtor returns by mail (in payment of his certificate of deposit) his check on another bank, in a third place, notwithstanding that before the check can be presented the drawer becomes insolvent; the holder in such case not having been deprived of evidence of the debt.⁵

¹ A bank in which bills of exchange are deposited for transmission only, fulfills its duty by sending them to the bank to which they are to be transmitted for collection, and is not responsible for any laches of that bank (*Mechanics' Bank v. Earp*, 4 Rawle, 384; *Wingate v. Mechanics' Bank*, 10 Pa. St. 104; *Daly v. Butchers', etc. Bank*, 56 Mo. 94).

² *Indig v. Nat. City Bank*, 80 N. Y. 100. But in this case there was no evidence that the maker of the note was insolvent, or that the depositor had suffered any damage. The case was distinguished in *Drovers' Nat. Bank v. Anglo-Am. etc. Co.*, 117 Ill. 100; 7 N. E. 601.

³ *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422.

⁴ *Drovers' Nat. Bank v. Anglo-American, etc. Co.*, 117 Ill. 100; 7 N. E. 601. A bank receiving a certificate of deposit for collection, and mailing it to the bank which first issued it, with a request for a remittance, is guilty of negligence (*First Nat. Bank v. Fourth Nat. Bank*, 6 C. C. A. 183; 56 Fed. 967; *German Nat. Bank v. Burns*, 12 Colo. 539; 21 Pac. 714; *First Nat. Bank v. City Nat. Bank* [Tex. Civ. App.], 34 S. W. 458).

⁵ *Farmers' Bank v. Newland*, 97 Ky. 464; 31 S. W. 38 [demurrer; no allegation that the surrender of the

§ 584. **Personal liability of sub-agents.** — It naturally follows that, where the New York rule prevails, the owner of a negotiable instrument, deposited with a banker for collection, cannot in general maintain an action for negligence in its collection against any one but the banker with whom he deposited it;¹ while, where the Massachusetts rule prevails, the owner may sue the person actually in fault, though not directly employed by him.² Under the New York rule, if the fault was that of any one employed by the bank, whether in the same town or at a distance, and whether a servant of the bank or a person or corporation in an independent business, the bank alone can sue the party in fault, except as hereafter stated.

§ 585. **Collecting by notary.** — How far a banker is liable for the neglect or misconduct of a notary public to whom he has given his principal's note or bill for protest, is a question not free from difficulty. In Massachusetts, Connecticut, Illinois, Pennsylvania, Maryland, Mississippi, Ohio, Wisconsin, and Louisiana, the banker is not answerable for the

certificate prevented the collection of the debt, or that it could have been collected at any time after defendant received it, or that the debt was lost by defendant's negligence].

¹ *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 Id. 203. "Possibly, under some circumstances, both [agent and sub-agent] may be answerable to the creditor," *e. g.*, creditor may, by his instructions to agent, make sub-agent also his agent (*Finch v. Karste*, 97 Mich. 20; 56 N. W. 123).

² See § 586, *post.* Where a bill is delivered by the payee to a bank to be transmitted for collection, the bank to which it is accordingly transmitted becomes the agent of the payee, and answerable to him alone for any breach of its duty in relation to the bill. If, by the mistake of the latter bank, the first-

mentioned bank pays over the value to the payee, and the bill proves to be dishonored, the first-mentioned bank can recover back the money on the payee's indorsement; and any breach of duty upon the part of the other is no defense (*Farmers' Bank v. Owen*, 5 Cranch C. C. 504). The holders of a bill payable in Washington indorsed it, and intrusted it to the M. Bank, to be transmitted to a bank in Washington for collection. The cashier of the M. Bank indorsed it, and sent it to the Washington bank, together with other bills, and without any statement of the ownership. Held, that the latter bank might be liable to the real owners of the bill for failure of duty in collecting (*Bank of Washington v. Triplett*, 1 Pet. 25). S. P., *Bank of Lindsborg v. Ober*, 31 Kans. 599; 3 Pac. 324; *First Nat. Bank v. Bank of Denver*, 4 Dill. 290; and cases *supra*.

failure of the notary to perform his duty:¹ the rule being generally stated to be that where the banker exercises reasonable prudence in the selection of a competent and trustworthy notary, he has done his whole duty; and this, in a case where any other person could have been employed, instead of a notary. In New York,² New Jersey,³ South Carolina,⁴ Missouri,⁵ Kansas,⁶ and Nebraska,⁷ bankers to whom paper has been sent for collection have been held answerable for the negligence of notaries employed by them. But in these cases, the neglect of the notary arose in a matter which did not require any official action as a *notary* — such as the giving of notices of non-acceptance or non-payment, a thing which the banker's cashier, or other servant, could have done with equal propriety.⁸ So the protest of an inland bill being entirely

¹ So held in *Massachusetts* (Fabens v. Mercantile Bank, 23 Pick. 332; Warren Bank v. Suffolk Bank, 10 Cush. 582); in *Connecticut* (East Haddam Bank v. Scovil, 12 Conn. 300); in *Illinois* (Ætna Ins. Co. v. Alton City Bank, 25 Ill. 243); in *Pennsylvania* (Bellemire v. Bank of the United States, 4 Whart. 105; 1 Miles, 173); in *Maryland* (Jackson v. Union Bank, 6 Harr. & J. 146; Citizens' Bank v. Howell, 8 Md. 530); in *Mississippi* (Tiernan v. Commercial Bank, 7 How. [Miss.], 648; Bowling v. Arthur, 34 Miss. 41); in the U. S. Supreme Court, in a Mississippi case (Britton v. Niccolls, 104 U. S. 757); in *Ohio* (Bank v. Butler, 41 Ohio St. 519); in *Wisconsin* (Stacy v. Dane County Bank, 12 Wisc. 629); and in *Louisiana* (Baldwin v. Bank of Louisiana, 1 La. Ann. 13; Frazier v. New Orleans Gas, etc. Co., 2 Rob. [La.], 294). On showing the delivery of the note to a notary for demand and protest in due time, the bank is, *prima facie*, exonerated from liability. It is not sufficient for the plaintiff to prove, in general terms, that the notary was a man of dissipated habits; he must prove that the

notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act (Agricultural Bank v. Commercial Bank, 7 Smedes & M. 592; compare Gerhardt v. Boatman's Savings Inst., 38 Mo. 60).

² Allen v. Merchants' Bank, 22 Wend. 215; Ayrault v. Pacific Bank, 47 N. Y. 570.

³ The absolute liability of the bank is affirmed in Davey v. Jones, 42 N. J. Law, 28.

⁴ Thompson v. Bank of South Carolina, 3 Hill [S. C.], 77.

⁵ Commercial Bank v. Barksdale, 36 Mo. 563.

⁶ Bank of Lindsborg v. Ober, 31 Kans. 599; 3 Pac. 324. In this case, the notary did not act in his official capacity, but was an ordinary sub-agent.

⁷ Wood River Bank v. First Nat. Bank, 36 Neb. 744; 55 N. W. 239.

⁸ Bank of Rochester v. Gray, 2 Hill, 227; see Coddington v. Davis, 1 N. Y. 189; Cowperthwaite v. Sheffield, 1 Sandf. 449; aff'd, 3 N. Y. 243.

superfluous, a banker who employs a notary to collect such a bill makes him his agent.⁹ But it may well be doubted whether, even in New York, a banker is responsible for the misconduct of a notary in a strictly official function. Notaries are commissioned public officers, whose office gives to their protest of foreign bills a peculiar authority and effect. A banker having such a bill to collect, is bound to employ a notary for the purpose. And although the banker may have a selection among hundreds of notaries, as to the one to whom he will intrust his business, it cannot, we think, be said that, as to strictly official acts, such a notary is the agent of the banker. He is an independent public officer; and for any negligence, omission, or other fault in the discharge of his official duty, in a matter requiring official action, he, and he alone, is responsible. Where, therefore, a notary is employed to protest a foreign bill of exchange, he is liable to any person injured by his neglect in so doing; for he acts in such cases as an officer, and not as a mere agent. This is the law of New York, as well as of all other states.¹⁰

§ 586. Who may sue for banker's negligence. — The duty of a banker to collect paper left with him for collection, not being founded on express contract, but on an implied agreement arising from the custom of banks, the duty is raised or the agreement implied, in behalf of such person as may be beneficially interested in having the duty performed; so that if A. leaves a note for collection, and B. becomes the owner of it before the time for the performance of the duty arrives, the latter is the proper person to bring suit for an injury arising from the neglect of that duty.¹

⁹ *Thompson v. Bank of South Carolina* (*supra*).

¹⁰ *Commercial Bank v. Varnum*, 3 Lans. 86, per Mullin, J.; reversed on other grounds, 49 N. Y. 269. See cases cited under § 313, *ante*.

¹ *Bank of Utica v. McKinster*, 11 Wend. 473. The Bank of P. by arrangement with the Bank of W., redeemed its circulation, and paid its drafts on the credit of its remittances for collection; and having received

from them, under this arrangement, a draft indorsed in blank and payable at sight, indorsed it for collection to a third bank. Held, that the Bank of P. could maintain an action against such third bank for neglect to charge the parties to the draft, or for the money collected. Under such an arrangement, it was the legal owner of the draft (*Commercial v. Union Bank*, 11 N. Y. 203).

§ 587. **Banker not bound to sue upon paper.** — A deposit of negotiable paper with a banker, for collection, only imposes upon him the duty of receiving the money, if paid, and if not paid, of making such demand of payment and giving such notices of demand and non-payment, as are necessary to fix the liability of the different parties to the paper. It is no part of the duty of a banker, as such, to employ counsel and bring suit upon notes left with him on deposit.¹ It is otherwise, however, in the case of a deposit of a note by a depositor with his creditor, as a collateral security for debt. In such a case, the creditor is bound to take every step requisite, not only to fix the liability of the parties to the note, by presentment and notice of dishonor, but he is further bound, in case of non-payment, to prosecute the parties with reasonable diligence and skill. If, by reason of his failure to do so, the debt is lost, it is imputed to him as laches, and the debtor will be discharged from his original obligation.²

§ 587a. **Burden of proof.** — To justify a recovery for more than nominal damages for negligently failing to promptly present a bill for acceptance or for payment, or, in case of dishonor, to notify the holder, and, if necessary, to take steps to fix the liability of the parties thereto, it must affirmatively appear by pleading¹ and proof that plaintiff would have suffered no loss but for such negligence.² A case for plaintiff is

¹ *Crow v. Mechanics', etc. Bank*, 12 La. Ann. 692; *First Nat. Bank v. Fourth Nat. Bank*, 6 C. C. A. 183; 56 Fed. 967; *Ryan v. Manufacturers', etc. Bank*, 9 Daly, 308.

² *Wakeman v. Gowdy*, 10 Bosw. 208; *Hart v. Hudson*, 6 Duer, 294; *Lawrence v. McCalmot*, 2 How. [U. S.], 427; see *Swinyard v. Bowes*, 5 Maule & Sel. 63; *Burt v. Horner*, 5 Barb. 504.

¹ A complaint which does not allege that defendant's negligence caused plaintiff to lose his claim states no cause of action (*Farmers' Bank v. Newland*, 97 Ky. 464; 31 S. W. 38).

² In *Allen v. Suydam* (20 Wend.

321), Walworth, Chan., writing the prevailing opinion, said: "Where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty; or where by the negligence of the agent, the liability of the drawer or endorser who was apparently able to pay the bill has been discharged, so that the owner of the bill cannot legally recover against such drawer or endorser . . . the agent is *prima facie* liable for the whole amount thereof with interest as damages, unless defendant is able to satisfy the court and jury that the whole amount of the bill has not been actually lost in consequence of such

made out, if facts are shown which make it reasonably probable that if defendant had promptly presented the bill, it would have been paid or accepted,³ or if the holder had been notified of its dishonor in time, that he could have collected it,⁴ or if the liability of a party negligently discharged had been secured, that such party was apparently able to pay it.⁵ *Prima*

negligence. But where it is perfectly evident that the draft would not have been accepted at any time after it had been received for collection [the drawee having received express instructions from the drawer not to accept without advices] taken in connection with the fact that the drawer's credit was not good at the time of the receipt of the draft for collection [having protested paper outstanding] rendering it highly improbable that he would have paid the draft to save his credit, if the bill had been sent back protested at an earlier day . . . the jury should have been instructed that upon the evidence, plaintiff was entitled to nominal damages only; or at least they should have been told to find only such damages as they should believe it probable the plaintiff might have sustained by the delay in presenting the draft for acceptance immediately." Where the principal cannot suffer any prejudice from lack of notice, the agent is not liable for failing to give it (*West Branch Bank v. Fulmer*, 3 Pa. St. 399). s. p., *Mott v. Havana Bank*, 22 Hun, 354; *Bumble v. Brown*, 73 N. C. 476.

³ *Allen v. Suydam*, *supra*. The drawer of a sight draft, protest waived, sent it to defendant for collection. Drawee living at a distance, being notified by mail, called six days thereafter, wrote his acceptance and promised to pay the next week, of all which notice was given drawer the same day. Two weeks

thereafter, the drawer made an assignment. Held, neither negligence nor loss shown. "There was an utter lack of evidence to afford a presumption of damages to plaintiff from defendant's conduct. No inference was possible from the evidence that there was a reasonable probability that the debt would have been paid if the debtor had been pressed for payment from the time when the draft was presented until he assigned" (*Crouse v. First Nat. Bank*, 137 N. Y. 383; 33 N. E. 301). s. p., *Finch v. Karste*, 97 Mich. 20; 56 N. W. 123 [failure to present]; *Sahlén v. Bank of Lonoke*, 90 Tenn. 221; 16 S. W. 373; *Diamond Mill Co. v. Groesbeeck Nat. Bank*, 9 Tex. Civ. App. 31; 29 S. W. 169).

⁴ Where a bank neither collects a draft sent to it for collection, nor notifies the drawer in due time of its non-payment, whether the bank is liable for the full amount of the draft is a question of fact dependent on the probability of collection, if the bank had used due diligence in pressing the drawee, or in notifying the drawer of non-payment (*Selz v. Collins*, 55 Mo. App. 55). s. p., *Lienau v. Dinsmore*, 41 How. Pr. 97; *Failing v. Fargo*, 12 N. Y. Week. Dig. 121.

⁵ *City Nat. Bank v. Clinton Co. Nat. Bank*, 49 Ohio St. 351; 30 N. E. 958. Sufficient having been done to charge the drawer, who was responsible, plaintiff is only entitled to nominal damages (*First Nat. Bk. v. Fourth Nat. Bk.*, 77 N. Y. 320).

facie, the agent is then liable for the whole amount of the bill, and interest; and the burden is cast upon him to show that less than that amount had been actually lost to plaintiff.⁶ A mere suggestion of evidence of the debtor's design to make a general assignment, where it appears that he had property, is not sufficient to rebut the presumption of his solvency and the collectibility of the debt.⁷

§ 588. **Special deposits.** — Under the National Banking Act, a bank has authority to receive special deposits, either gratuitously or as ordinary deposits;¹ and the bank is liable for damage to a depositor by the loss of such special deposits, if they were made with the acquiescence of its officers and directors, and the bank has been guilty of negligence.² If the special deposit was made gratuitously, the depositor must show gross negligence on the part of the bank;³ and the fact that the

⁶ Where it is conceded or proved that the bill would have been paid had it been promptly presented, defendant is liable as matter of law for full amount due on it (*Whitney v. Merchants' N. Exp. Co.*, 104 Mass. 152; *Trinidad Nat. Bank v. Denver Nat. Bank*, 4 Dillon, 290; *Bank of Hanover v. Kenan*, 76 N. C. 340). But where, under the evidence, it is only more or less probable that the entire loss was due to defendant's negligence, without which there would have been no loss, it is for the jury to say whether the loss is the full amount of the draft (*Selz v. Collins*, 55 Mo. App. 55). Where there is evidence both ways as to the defendant's negligence, a question of fact is raised which the defendant is entitled to have submitted to the jury (*Weyerhauser v. Dun*, 100 N. Y. 150; 2 N. E. 274). In that case, an agent, authorized to accept a renewal note with indorsers, accepted a new note void as against one of the indorsers, by reason of a material alteration made by the maker. *S. P.*, *Bradstreet v. Everson*, 72 Pa. St. 124.

⁷ *Fahy v. Fargo*, 61 Hun, 623; 17 N. Y. Supp. 344. The referee found that "it was not reasonably probable that plaintiff could have collected his claim against the debtor, had the draft been returned to him according to instructions," and awarded nominal damages only. Held error; it having appeared that the debtor had property, a presumption of law arose that the debtor would have paid the draft if defendant had discharged his duty.

¹ *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

² *National Bank v. Graham*, 100 U. S. 699; *First Nat. Bank v. Zent*, 39 Ohio St. 105. Special authority of the directors for deposit of securities for safe keeping is necessary (*First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278).

³ *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 277; *First Nat. Bank v. Rex*, 89 Pa. St. 308; *Scott v. National Bank*, 72 Id. 471. In the last case, the teller of the bank having been dishonest, and having taken the special deposit and prop-

property of the bank was stolen from the same place, and at the same time with the special deposit, is not in itself conclusive evidence that the bank has not been guilty of gross negligence.⁴ A bank is liable, if it pays out regular deposits without due regard to the rules for such payments prescribed by its by-laws;⁵ and it cannot by vague stipulations, even though they are assented to by the depositor, free itself from the duty to use all reasonable care in the payment of deposits.⁶

erty of the bank itself, it was held that the depositor could not recover, unless the bank had had reasonable grounds to suspect the integrity of the teller, and had not removed him. In *De Haven v. Kensington Nat. Bank* (81 Pa. St. 95), the bank was held not liable, because its officers took as much care of the special deposits as they did of the property of the bank. In *Preston v. Prather* (137 U. S. 604; 11 S. Ct. 162), defendants learning that their cashier had been speculating, and charging him therewith, were told that he had speculated, but was not doing so then, and would not thereafter; no efforts were made to verify his statements, or whether he had used property not his own. Eight months later it was learned that he had been speculating again, but he stated that these were deals for friends, and were closed: an examination of the books and securities, though not of the special deposits, was then made, but the cashier was retained in his position. Held, gross negligence, and defendants were liable whether regarded as gratuitous bailees, or bailees for hire for a special deposit of securities stolen by the cashier. See *Prather v. Kean*, 29 Fed. 498. A bank is bound to take due precautions to identify and protect securities deposited for safe keeping, so as to prevent their misappropriation by its officers and clerks (*Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263; 23 N. E. 875).

See *Dearborn v. Union Nat. Bank*, 61 Me. 369; *American Tel. Co. v. Walker*, 72 Md. 454; 20 Atl. 1; *United Society v. Underwood*, 9 Bush, 609 [great number of authorities cited]; *United Tel. Co. v. Cleveland*, 44 Kans. 167; 24 Pac. 49; *Joslyn v. King*, 27 Neb. 38; 42 N. W. 756; *Bass v. Cantor*, 123 Ind. 444; 24 N. E. 147; *Cross v. Kistler*, 14 Colo. 571; 23 Pac. 903; *Bileu v. Paisley*, 18 Oreg. 47; 21 Pac. 934.

⁴*Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

⁵*People's Savings Bank v. Cupps*, 91 Pa. St. 315. In *Goldrick v. Bristol Co. Savings Bank* (123 Mass. 320), a bank was held not liable for an amount which it paid innocently to one who falsely personated the depositor, and presented his pass-book.

⁶*Appleby v. Erie Bank*, 62 N. Y. 12. Where the bank had expressly stipulated that it should not be liable for payments made to persons presenting the book of a depositor, it was held that the bank was nevertheless bound to examine and compare signatures, and take all reasonable precautions. It is the duty of a depositor, upon his side, to use reasonable care to prevent frauds upon the bank (*Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96; 6 S. Ct. 657). *s. p.*, *Schoenwald v. Metropol. Sav. Bank*, 57 N. Y. 418; *Allen v. Williamsburgh Sav. Bank*, 69 Id. 314; *Kummel v. Germania Sav. Bank*, 127 Id. 488; 28 N. E.

§ 589. **Liability of directors.** — The directors of a bank are not mere agents, like cashiers, tellers and clerks. They are trustees for the stockholders; and they not only act for the bank and in its name, but they are, in a qualified sense, the bank itself, and they are personally liable for a gross neglect of duty.¹ But in the absence of fraud or gross negligence, they are to be regarded as gratuitous bailees, and are not liable for losses sustained through the dishonesty of the cashier or other persons employed by them.²

398; *Gearns v. Bowery Sav. Bank*, 135 N. Y. 557; 32 N. E. 249. The question of contributory negligence cannot arise unless the depositor has, in drawing the check, left blanks unfilled, or by some affirmative act of negligence, has facilitated the commission of a fraud by some one into whose hands the check has fallen (*Crawford v. West Side Bank*, 100 N. Y. 50; 2 N. E. 881).

¹ *United Society v. Underwood*, 9 Bush, 609, 617; *Cutting v. Marlbor*, 78 N. Y. 454; 6 Abb. N. C. 388; *Brinkerhoff v. Bostwick*, 88 Id. 52; s. c., 105 Id. 567; and consult s. c., 99 Id. 185; *Nelson v. Burrows*, 9 Abb. N. C. 280; *Bank v. Bossieux*, 4 Hughes, C. Ct. 387; *Batchelor v. Planters' Bank*, 78 Ky. 435; *Prather v. Kean*, 29 Fed. 498. Compare *Cragie v. Hadley*, 99 N. Y. 131; *Williams v. McDonald*, 42 N. J. Eq. 392; 7 Atl. 866. An ac-

tion will lie by depositor against the directors for gross negligence, in advertising for and continuing to do business, when the slightest examination by the directors of the affairs of the bank would have disclosed that it was utterly insolvent (*Delano v. Case*, 17 Ill. App. 531). "Trustees of a savings bank are deemed to undertake to exercise the ordinary skill and judgment requisite for the discharge of their delicate trust" (*Hun v. Cary*, 82 N. Y. 65).

² *Dunn v. Kyle*, 14 Bush, 134; *German Amer. Bank v. Auth*, 87 Pa. St. 419; *Scott v. National Bank*, 72 Id. 471; *Fleming v. Northampton Bank*, 62 How. Pr. 177, where the court cites with approval *Foster v. Essex Bank*, 17 Mass. 479; *Morris v. Westminster Bank*, 1 C. & E. 498; and consult *Bank of California v. Western U. Tel. Co.*, 52 Cal. 280.

CHAPTER XXVI.

CLERKS AND OTHER RECORDING OFFICERS.

§ 590. General rule of liability.

591. Illustrations of the rule.

592. False certificates, and mistakes in recording.

§ 593. Liability of towns for negligence of their clerks.

§ 590. **General rule of liability.**—Clerks of courts, of counties and towns, prothonotaries, registers of deeds, and other like officers, belong to that class of ministerial officers to which we have referred in another place.¹ Their duties are prescribed in general terms by statute; and, in some of the states, a penalty is affixed to breaches of official duty by them. In many of the states, as in New York,² they are expressly declared to be liable for all damages resulting from their errors and mistakes in certain designated duties. But independently of the statute, they are liable in damages to any one who is specially injured by their omission to perform a duty imposed, or their negligent performance thereof. They are liable not only for their personal default or negligence, but also for that of their deputies within the ordinary course of their business.³

§ 591. **Illustrations of the rule.**—The reported cases which illustrate and apply the foregoing rule of liability to this class of officers are few in number, and without circumstances of novelty. A number of these cases turn upon the liability of clerks for negligence in taking or certifying as to the sufficiency

¹ See §§ 312, 313, *ante*.

² See § 592, *post*.

³ *Welldes v. Edsell*, 2 McLean, 366. The deputy is responsible for his acts to the clerk alone, and not to third parties (*McNutt v. Livingston*, 7 Smedes & M. 641; *Snedicor v. Davis*, 17 Ala. 472). As to sheriffs, see § 618, *post*. The register of New York City is liable for damages sus-

tained by one making the usual requisition for a certificate of search, a mortgage having been overlooked; and it is no defense that plaintiff designated the clerk whom he desired should make the search, or that he failed to notify the register as soon as he learned of the existence of the mortgage (*Van Schaick v. Sigel*, 9 Daly, 383; 60 How. Pr. 122).

of bonds. Thus the clerk of a court is liable to one damaged by his failure to require security for costs in a proper case, on issuing a writ,¹ or by his accepting a bond with insufficient sureties, where it is his duty to inquire into their sufficiency,² or by his approving an appeal bond which provides an insufficient penalty.³ So he would be liable for refusing or neglecting to issue a writ or file a bill of exceptions⁴ in a proper case. And when a clerk refused to issue citation, on the demand of the plaintiff, though informed that the cause of action would be barred by limitation within a short period, unless saved by service of citation, he was held liable for the amount of the debt after it was barred by limitation.⁵ He is liable for failure to properly index a judgment, so as to make it a lien on judgment debtor's lands;⁶ and for neglecting to enter a cause on the docket, whereby the plaintiff in the action lost the opportunity of obtaining judgment until a subsequent term, the defendant in the action having in the meantime become insolvent.⁷ He is liable for misplacing papers filed with him, under legal requirement, so that they could not be found on reasonable examination.⁸ But he is not liable for omitting to do an act not required of him by law.⁹

¹ Wright v. Wheeler, 8 Ired. Law, 184.

² McNutt v. Livingston, 7 Smedes & M. 641. See Bevens v. Ramsey, 15 How. [U. S.], 179; Snedcor v. Davis, 17 Ala. 472; Governor v. Wiley, 14 Id. 172. In the last case, the sureties of the clerk were held liable on their bond. In Ohio, it has been held that issuing letters of guardianship, before the guardian has filed his bond, is not such a breach of official duty as to charge the clerk's sureties (State v. Sloane, 20 Ohio, 327).

³ Billings v. Lafferty, 31 Ill. 318; Hubbard v. Switzer, 47 Iowa, 681; Haverly v. McClelland, 57 Id. 182; Brock v. Hopkins, 5 Neb. 231.

⁴ Collins v. McDaniel, 66 Geo. 203.

⁵ Anderson v. Johett, 14 La. Ann. 614.

⁶ Redmond v. Staton, 116 N. C.

140; 21 S. E. 186; Strain v. Babb, 30 S. C. 342; 9 S. E. 271. See note 9, § 592, *post*.

⁷ Brown v. Lester, 13 Smedes & M. 392. The clerk of court and his sureties held liable for his failure to enter the sum for which a judgment was recovered; thereby defeating a levy (Governor v. Dodd, 81 Ill. 163).

⁸ Rosenthal v. Davenport, 38 Minn. 543; 33 N. W. 618. It is no excuse for a clerk's failure to issue an execution, when directed, that the record was lost from which it could be made out, without showing that he had exercised proper diligence in preserving the record (McFarland v. Burton, 89 Ky. 294; 12 S. W. 336).

⁹ Robinson v. Gell, 12 C. B. 191. A clerk of court refused to issue more than one execution on a judgment, and the statute was silent as

§ 592. **False certificates, and mistakes in recording.**—A clerk of court is liable for falsely certifying to the court or to the sheriff that a valid bond has been given, as required to do by law, by reason of which the lien of a judgment¹ or attachment² is lost. A clerk, like a commissioner of deeds or a notary, is liable for mistakes in his certificate of an acknowledgment of an instrument.³ A clerk or other recording officer, who undertakes to search the records of his office, is liable for any mistake in his certificate, proximately⁴ causing damage to one to whom he owed any duty in the matter.⁵ If he certifies to a purchaser of land that there are no liens of judgments or mortgages upon it, when in fact there is one, he is liable to such purchaser.⁶ It makes no difference that the return was made by a person other than the clerk, provided the latter employed the searcher who made the return, or accepted and used as his own a search made and certified by the searcher voluntarily

to the number of executions which might be issued. Held, not liable for a breach of his official duty (*State v. Ruland*, 12 Mo. 264).

¹ A judgment-debtor, for the purpose of superseding the judgment against him, pending an appeal, tendered to the clerk sufficient security. The clerk allowed the bond to be signed in blank, with the understanding that he might afterward fill it up, but before it was filled up, the sureties revoked the authority. The clerk, however, at the instance of counsel, filled up the bond, and certified it to the court as a valid bond. The judgment having been affirmed, and the sureties become bound by the judgment, the latter filed a bill against the judgment-creditor and the clerk, and obtained a decree for a perpetual injunction. Held, the clerk was liable to the judgment-creditor for the amount of the original judgment, with interest, and for the expenses of defending the injunction suit (*Williams v. Hart*, 17 Ala. 102).

² *Work v. Hoofnagle*, 1 Yeates, 506.

³ See *Barnes v. Smith*, 3 Humph. 82. In that case, the clerk omitted to state in his certificate of acknowledgment of a mortgage, that he was personally acquainted with the mortgagor, as required by statute. The court held that the original certificate, and not a copy, was the only competent evidence to prove the delinquency; and, that not being produced, a verdict for the defendant was sustained.

⁴ *Kimball v. Connolly*, 2 Abb. Ct. App. 504; *Lyman v. Edgerton*, 29 Vt. 305.

⁵ *Day v. Reynolds*, 23 Hun, 131.

⁶ *McCaraher v. Commonwealth*, 5 Watts & S. 21; *Ziegler v. Commonwealth*, 12 Pa. St. 227; *Chase v. Heaney*, 70 Ill. 268; *Smith v. Holmes*, 54 Mich. 104; *Van Schaick v. Sigel*, 58 How. Pr. 211; *aff'd*, 60 Id. 132; 9 Daly, 383; *Harrison v. Brega*, 20 Upp. Can. [Q. B.], 324. It is immaterial that no fee was paid for the search (*Ib.*).

and without employment.⁷ A clerk having received a deed or mortgage for record, and entered upon it "received for record," is bound to record it. If he suffers it to go out of his hands unrecorded, he is liable to any one who is thereby damaged.⁸ But he is not bound, unless required by law, to index an instrument left with him for record.⁹ He is, of course, liable for damages caused by his incorrectly recording an instrument.¹⁰

§ 593. Liability of towns for negligence of their clerks.— In Vermont, towns are made liable by statute for the defaults of their clerks. Under this statute, it being the duty of town clerks to index their records, the town is liable to one injured by neglect to provide such an index.¹ But the town will not be liable for the mere refusal of the clerk to refer to a particular record, or for false verbal representations of the clerk concerning the records, when the record was open to the inspection of the applicant, and he neglected to examine it for himself.²

⁷ *Morange v. Mix*, 44 N. Y. 315. If defendant would avail himself of the fact that the plaintiff is protected from loss, or has ample redress against another person (by covenants against incumbrances in the plaintiff's deed) he assumes the burden of proving that a remedy exists, which is available to the plaintiff, and to which he should resort (*Ib.*).

⁸ *Welles v. Hutchinson*, 2 Root, 85.

⁹ The indexing of a mortgage is no part of the record thereof; and the omission of the clerk to index it in the proper book does not deprive the mortgagee of the right of priority given him by the recording act

(*Mutual Life Ins. Co. v. Dake*, 87 N. Y. 257; *aff'd* 1 Abb. N. C. 381).

¹⁰ He is liable for only nominal damages for a mistake in recording a deed containing a recital of an assumption by the grantee of a prior mortgage given by the grantor, by which error the amount assumed appears on the record to be less than the sum named in the deed, unless the grantor is unable to collect the full amount assumed from his grantee, and thereby suffers an actual loss (*State v. Davis*, 117 Ind. 307; 20 N. E. 159).

¹ *Hunter v. Windsor*, 24 Vt. 327.

² *Lyman v. Edgerton*, 29 Vt. 305.

CHAPTER XXVII.

NOTARIES PUBLIC.

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| <p>§ 594. General rule of liability for negligence.</p> <p>595. [Consolidated with § 594].</p> <p>596. [Consolidated with § 585].</p> <p>597. Standard of care in presenting and protesting bills.</p> <p>598. Illustrations of liability.</p> | <p>§ 599. Giving notice of dishonor of bills.</p> <p>600. Negligence must be direct cause of indorser's discharge.</p> <p>601. Defenses by notary.</p> <p>602. Liability for defective acknowledgments.</p> |
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§ 594. **General rule of liability for negligence.** — The office of notary is of ancient origin, and is known to all commercial civilized countries. In this country, a notary's chief functions are to note and protest bills of exchange, to note and draw up ship-protests, and all other protests which are customary, according to the usage of merchants; and, in addition, notaries are very generally, if not universally, authorized by statute to administer oaths and to take acknowledgments of deeds and other instruments.¹ They belong to that class of ministerial officers who are subject to the general rule that ministerial officers are liable in damages to one to whom they owe any duty, who is specially injured by their omission to perform, or their unskillful performance of such duty.² The powers and duties of notaries are generally prescribed by statute, by which their liability to public prosecutions and to private action for official misconduct is declared.³

¹ "The expression *notarial act* is one which has a technical meaning, and it seems generally to signify the act of authenticating or certifying some document or circumstance by a written instrument, under the signature and official seal of a notary; or of authenticating or certifying as a notary some fact or circumstance by a written instrument under his signature only" (Brooke, on the

Office of a Notary, 41; see *Fogarty v. Finlay*, 10 Cal. 239).

² See §§ 313, 314, *ante*.

³ The New York statute (2 N. Y. Rev. Stat. 284, § 48) declares their liability for damages for any misconduct in any case in which they are authorized to act either by the laws of that state "or of any other state, government or country, or by the law of nations or by commercial usage."

§ 595. [consolidated with § 594.]

§ 596. [consolidated with § 585.]

§ 597. **Standard of care in presenting and protesting bills.**

—A notary who receives a bill of exchange for the purpose of presenting it, and, in case of non-acceptance or non-payment, to protest it, is bound to use ordinary diligence in the matter, so as to secure the rights of the owner against all the parties thereto. If, by reason of any omission or carelessness in the presentment, in the protest, or in the giving notice thereof to the proper parties, the owner of the bill suffers loss, the delinquent notary is liable for the damages sustained. Having once undertaken to perform a strictly notarial act, *e. g.*, the presentment and protest of a foreign bill, he cannot delegate his powers to any other persons. If he presents the bill, he only can protest it. He cannot depute another to present it, and he himself protest it, even though that other be also a notary;¹ for it is a general rule that a personal trust or power conferred in confidence in the personal qualifications of an individual, cannot be delegated, and, indeed, that only such powers as are of a mechanical nature can be delegated.² It has been repeatedly adjudged that a notary must *personally* present a bill which he intends to protest, and cannot delegate his authority to a clerk or agent.³ A custom has long prevailed among notaries in New York city, and doubtless in other places, by which the presentment of inland bills and promissory notes is made by the notary's clerk. As such instruments, however, do not require strict protest, such presentment is not strictly an official act, and may be made by any one.⁴

¹ Commercial Bank v. Barksdale, 36 Mo. 563; Commercial Bank v. Varnum, 49 N. Y. 269.

² See Ess v. Truscott, 2 Mees. & W. 385; Powell v. Tuttle, 3 N. Y. 396, 407; Newton v. Bronson, 13 Id. 593; Story on Agency, § 14.

³ Onondaga Co. Bank v. Bates, 3 Hill, 53; Chenoweth v. Chamberlin, 6 B. Monr. 60; Carmichael v. Bank of Penna., 4 How. [Miss.], 567; Sac- rider v. Brown, 3 McLean, 481;

Commercial Bank v. Barksdale, 36 Mo. 563. In Nelson v. Fotherall (7 Leigh, 179), one of the judges expressed the opinion that a clerk regularly employed by the notary might present bills for him. But it is clear that the court, as such, did not pass upon the question.

⁴ It is the custom in England for clerks of notaries to present bills, whether foreign or inland, for acceptance or payment, the notary

But a protest made under such circumstances is worthless, and cannot be used as evidence under the statutes which (in New York and other states) make the protest of an inland bill presumptive evidence of its dishonor.⁵ Upon proof, however, of an established, general and notorious usage to present even foreign bills by a deputy, it is held in New York that such presentment will sustain a protest by the notary, at common law.⁶

§ 598. Illustrations of liability.—It will not be deemed necessary for us to give even a summary of the very numerous reported cases in which indorsers of commercial paper have been released from liability on account of want of sufficient presentment or protest. These cases furnish many instances of carelessness on the part of notaries; but, either because such acts of carelessness have not amounted to such culpable negligence as to be actionable, or because the notary's liability has been so fully conceded that no litigation has arisen, the books contain very few cases against notaries for negligence in their official duties. It is clearly culpable negligence for a notary to protest a bill for non-payment before its maturity,¹ or to delay to demand payment until after its maturity.² The negligent omission to notify the proper parties of the dishonor of a bill, whereby the holder loses his remedy against any such parties, will make the notary liable. But a notary is not bound to know the residence of the parties to a bill.³ He is not bound to know any one but the holder or the last indorser; and they should at all times be prepared to give him precise informa-

afterwards noting the presentment and preparing his protest (Brooke on the Office of a Notary [3d ed.], 71, 128; see Chitty on Bills, 334).

⁵ Onondaga Co. Bank v. Bates, 3 Hill, 53.

⁶ Commercial Bank v. Varnum, 49 N. Y. 269.

¹ Stacy v. Dane County Bank, 12 Wisc. 629; American Express Co. v. Haire, 21 Ind. 4. See Mechanics' Bank v. Merchants' Bank, 6 Metc. 13.

² See Fabens v. Mercantile Bank, 23 Pick. 330; Warren Bank v. Suf-

folk Bank, 10 Cush. 582; Jackson v. Union Bank, 6 Harr. & J. 146.

³ In Mulholland v. Samuels (8 Bush, 63), held, that the notary was not bound to search for such residence. In Vandewater v. Williamson (13 Phil. 140), held, no part of the official duty of a notary to demand payment of a note placed in his hands for protest. In making such demand, he acts simply as the agent of the holder, and if the holder fails to furnish him with information as to where the maker can be

tion as to the residence of the party whom they wish to charge. If the last indorser gives a notary a wrong direction as to the first indorser's residence, he ought not to complain that, in following his directions, the notary misdirected a notice of dishonor.⁴ It has been remarked, however, that the fact that a notary was misdirected, especially by a stranger, is no excuse, if, by the exercise of reasonable diligence, he could have procured better and correct information.⁵

§ 599. Giving notice of dishonor of bills.— Notice of the dishonor of a bill should be given, as soon as it reasonably can be, to *all* the antecedent parties on a foreign bill. But in the case of inland bills, which are not protestable by the rules of the commercial law, it is said not to be the duty of a notary to give notice of its dishonor to any party except the one from whom he received it. Nevertheless, where a statute enjoins upon a notary, in protesting promissory notes, the duty of giving such notice of dishonor as may be requisite to charge the parties to it, the notary is bound to notify *all* the antecedent parties.¹

§ 600. Negligence must be direct cause of indorser's discharge.— It does not follow, because the holder of a bill has lost his remedy against an indorser for want of due presentment and demand made, and due notice of dishonor given to the indorser, that this is sufficient to maintain an action against the notary. It is necessary to go further, and prove that the discharge of the indorser was attributable directly to the notary's neglect and want of skill.¹ The holder is not bound, however, to prosecute a fruitless suit against the indorser before he can maintain an action against his own agent for neglecting to make due demand of the maker, or to give notice

found, he cannot be charged with negligence in failing to find him.

⁴ See *Bellemire v. U. S. Bank*, 4 Whart. 105 ; *Bank of Mobile v. Marston*, 7 Ala. 108 ; *Morgan v. Van Ingen*, 2 Johns. 204.

⁵ See *Citizens' Bank v. Howell*, 8 Md. 530, 545.

¹ *Bowling v. Arthur*, 34 Miss. 41;

see *Frazier v. New Orleans Gas Co.*, 2 Rob. [La.], 294; *Allen v. Merchants' Bank*, 22 Wend. 215 ; rev'g s. c., 15 Id. 482 ; *Bank of Utica v. Smedes*, 3 Cow. 663 ; 20 Johns. 372.

¹ *Emmerling v. Graham*, 14 La. Ann. 390 ; *Mechanics' Bank v. Merchants' Bank*, 6 Metc. 13.

of his default. The legal presumption is, that the indorser will, if sued, avail himself of his discharge.²

§ 601. **Defenses by notary.** — Notwithstanding the negligence of a notary in the presentment, protest, or notice of dishonor of a bill, yet where the holder, being advised of such neglect, omits to avail himself of other grounds of action against the indorser, independent of the protest, *e. g.*, waiver of protest and notice by the indorser, he cannot claim to have lost his remedy against the indorser by the notary's negligence, and cannot, therefore, recover against the latter.¹ If, notwithstanding the notary had done his duty, the owner could not have recovered on the bill, the notary is not liable for his negligence; and in an action against him, it would seem that the notary may avail himself of any defense which the party sought to be charged on the bill could have set up.²

§ 602. **Liability for defective acknowledgments.** — A very generally exercised function of notaries public in this country is the administration of oaths and affirmations, and the taking of affidavits and acknowledgments of deeds and other instruments. Except in Maine, New Jersey, Maryland and Kentucky, notaries public have statutory power to receive the proof or acknowledgment of instruments in writing for the purpose of record. They are also very generally empowered to take depositions; and in Florida and Louisiana they are authorized to perform the marriage ceremony. Many of the states require notaries to keep an official record or register of their acts, under a penalty for their failure to do so, and to give bonds for the faithful performance of their duties. For his incapacity, mistake or negligence in the performance of these duties, a notary public is liable to one who suffers in conse-

² *Ib.* The holder's action against an indorser was dismissed, on proof of notary's failure to serve notice of protest. In a subsequent action against the bank employing the notary, for his negligence, held, the amount of the note and interest were recoverable, but not the expenses of prosecuting the endorser (*Downer v. Madison Co. Bank*, 6 Hill, 648).

¹ *Franklin v. Smith*, 21 Wend. 624. See *Van Wart v. Woolley*, 3 Barn. & Cr. 439; 5 Dowl. & R. 374; *Swinyard v. Bowes*, 5 Maule & S. 62; *Holbrow v. Wilkins*, 1 Barn. & Cr. 10.

² See *Reed v. Darlington*, 19 Iowa, 349.

quence of want of care in his official capacity.¹ So, where, in taking the acknowledgment of a mortgagor, a notary omitted to state, as required by the statute, that the person acknowledging it was known to him, and, in consequence of the omission, the mortgage was held to be insufficient, and the mortgagee lost the security of the indebtedness, the notary was held liable for the amount of the debt and interest; and the fact that the certificate had been partially filled in by the attorney for the mortgagee was no excuse.²

¹See *Dwyer v. Woulfe*, 40 La. Ann. 46; 3 So. 360 [neglect to register a mortgage].

²*Fogarty v. Finlay* 10 Cal. 239. So if a notary states in his certificate of acknowledgment that the person executing the instrument is known to him, when in fact he does not know him, he is liable for all damages which may result from his misstatement; and it is no defense that he believed the certificate to be true. It is his official duty, where he has not personal knowledge of the identity of a person, to ascertain it by credible witnesses who are known to him (*State v. Meyer*, 2 Mo. App. 413). See *Rochereau v. Jones*, 29 La. Ann. 82; *People v. Colby*, 49 Mich. 456; *People v. Butler*, 74 Id. 643; 42 N. W. 273 [false acknowledgment of mortgage]; *Hatton v. Holmes*, 97 Cal. 208; 31 Pac. 1131 [same of deed]. A notary who falsely certified an acknowledgment to a forged satisfaction piece of a chattel mortgage, held liable to the party injured for all damages sustained (*Lesser v. Wunder*, 9 N. Y. Week. Dig. 56). It is a good defense that a defectively acknowledged mortgage, if it had been properly acknowledged, would not have secured the debt, the property it purported to cover being valueless (*McAllister v. Clement*, 75 Cal. 182; 16 Pac. 775).

CHAPTER XXVIII.

PHYSICIANS AND SURGEONS.

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| <p>§ 603. Right to recover for services.</p> <p>604. Obligation of unpaid physician.</p> <p>605. Obligation of paid physician.</p> <p>606. Degree of skill required.</p> <p>607. He is bound to have skill.</p> <p>608. Standard of skill not absolute.</p> <p>609. Tests of skill.</p> <p>610. Character of disease may determine degree of skill.</p> | <p>§ 611. And so may the habits and tendencies of the patient.</p> <p>612. Physicians not liable for errors of judgment.</p> <p>613. Duty of continuing in attendance.</p> <p>614. Evidence of negligence and burden of proof.</p> <p>615. Contributory fault.</p> |
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§ 603. **Right to recover for services.** — In England, a *physician*, like an advocate, cannot recover fees by any legal process, as by an ancient fiction he is supposed to render his services from purely philanthropic motives;¹ though a mere *surgeon* has a legal right to his fees. Accordingly, a physician in England is liable for his negligence only to the extent to which one is liable who renders a gratuitous service; while a surgeon or apothecary is subject to the usual rules of liability. No such distinction exists, or appears ever to have existed, in this country. Physicians of all grades can sue for their fees;² and therefore they are liable for their negligence, equally with surgeons.

¹ In *Attorney-General v. Royal College of Physicians* (7 Jur. [N. S.] 511), it was held that a physician might recover for professional services on a special contract.

² *Judah v. McNamee*, 3 Blackf. 269. A physician who, during his attendance upon a patient (defendant), having also attended patients infected by small-pox, and by want of proper care, communicated the infection to defendant and his family, thus necessitating further attend-

ance and an increased bill, held, not entitled to recover for the additional services rendered necessary by his want of proper care, and defendant was entitled to a further deduction from that portion of the bill which was properly chargeable, sufficient to reimburse him for all damages which he had sustained by bodily suffering and loss of time (*Piper v. Menifee*, 12 B. Monr. 465). s. p., *Whitesell v. Hill* Iowa, ; 66 N. W. 894.

§ 604. **Obligation of unpaid physician.**—A physician or surgeon attending gratuitously is liable for gross negligence only. Yet, as his duties relate more or less directly to the preservation of human life, it follows, upon the principles elsewhere stated,¹ that it may often be gross negligence in a physician to fail in giving such attention to his patient as would only be expected from a well-paid person in respect to matters of mere pecuniary value. Inasmuch as gratuitous services are more generally rendered by young and inexperienced physicians than by those who are well established in their business, a presumption naturally arises that one who renders such services is not possessed of great skill, and was not supposed to be by the patient. This presumption may be overcome by proof to the contrary; and the physician must be judged by the standard to which he led the patient to believe that he had attained; or, if he has done nothing to mislead his patient upon this point, his responsibility will be measured by the degree of skill which he is proved actually to possess. It should be added, that a physician who is paid for his services in treating the poor without charge to them does not serve gratuitously, so as to affect his duty to exercise reasonable and ordinary care, skill and diligence, in such treatment.²

§ 605. **Obligation of paid physician.**—Although a physician or surgeon may doubtless, by express contract, undertake to perform a cure absolutely,¹ the law will not imply such a contract from the mere employment of a physician.² A

¹ See § 46, *ante*; *Ritchey v. West*, 23 Ill. 385.

² *Du Bois v. Deckert*, 130 N. Y. 325; 29 N. E. 313 [almshouse physician]. See *Becker v. Janinski*, 27 Abb. N. Cas. 45, and note thereto on gratuitous medical service.

¹ See *Leighton v. Sargent*, 7 Foster, 468. A declaration that a physician and surgeon "undertook and promised to set, dress, take care of, and manage, as such physician and surgeon, said broken bone, in a proper, prudent and skillful manner;" held not to allege a special under-

taking to cure plaintiff, but only to use reasonable professional skill and attention to that end (*Reynolds v. Graves*, 3 Wisc. 416).

² *Gallaher v. Thompson*, Wright [Ohio], 466; *McCandless v. McWha*, 22 Pa. St. 261. In the last case, Woodward, J., said: "The implied contract of a physician or surgeon is not to cure — to restore a limb to its natural perfectness — but to treat the case with diligence and skill. The fracture may be so complicated that no skill vouchsafed to man can restore original straightness and

physician is not a warrantor or insurer of a cure, and is not to be tried by the result of his remedies.³ His only contract is to treat the case with reasonable diligence and skill. If more than this is expected, it must be expressly stipulated for. A physician is only liable for his own negligence, and not for that of another physician independently employed by the patient, though on his recommendation.⁴

§ 606. Degree of skill required. — The general rule, therefore, is, that a medical man, who attends for a fee, is liable for such a want of ordinary care, diligence, or skill upon his part, as leads to the injury of his patient.¹ To render him liable, it

length; or the patient may, by willful disregard of the surgeon's directions, impair the effect of the best-contrived measures. He deals not with insensate matter, like the stonemason or bricklayer, who can choose their materials and adjust them according to mathematical lines; but he has a suffering human being to treat, a nervous system to tranquilize, and a will to regulate and control." See *Carpenter v. Blake*, 60 Barb. 488.

³ *Hancke v. Hooper*, 7 Carr. & P. 81; *McCandless v. McWha*, 22 Pa. St. 261. Proof that the surgeon gave assurances to plaintiff that he possessed and would exercise extraordinary skill, and effect a cure, held not admissible, when not pleaded (*Goodwin v. Hersom*, 65 Me. 223).

⁴ *Myers v. Holborn*, 59 N. J. Law, 193; 33 Atl. 389; *Hitchcock v. Burgett*, 38 Mich. 501. Defendant attended plaintiff for typhoid fever, and, as a result of the treatment, she recovered. While sick, plaintiff's eye became affected, and she requested defendant to send an oculist, which he promised, but neglected, to do. An oculist, who was afterwards procured by another, stated that he could do nothing, but that, if he were called sooner, he might have

effected a cure. Held, not defendant's duty to provide the specialist, and, as the evidence failed to show that the injury to plaintiff's eye was the result of the fever, plaintiff was properly nonsuited (*Jones v. Vroom*, 8 Colo. App. 143; 45 Pac. 234). A railroad company is not liable for any negligence of its surgeon, employed by it to treat gratuitously its injured employees, in causing an injured employee to be moved from one place to another (*York v. Chicago, etc. R. Co.*, Iowa, ; 67 N. W. 574). *s. p.*, *Allan v. State S. S. Co.*, 132 N. Y. 91; 30 N. E. 482 [ship's surgeon; giving poisonous medicine by mistake]. See *Perionowsky v. Freeman*, 4 Fost. & F. 977 [hospital physicians not liable for maltreatment by attendant in administering bath to patient ordered by them, they not being present or cognizant of it].

¹ *Lamphier v. Phipos*, 8 Carr. & P. 475; *Landon v. Humphrey*, 9 Conn. 209; *Wood v. Clapp*, 4 Sneed, 65; *Carpenter v. Blake*, 69 Barb. 488; 50 N. Y. 696; *Bellinger v. Craigie*, 31 Barb. 534; *Briggs v. Taylor*, 28 Vt. 180; *McNeveins v. Lowe*, 40 Ill. 209; *Ritchey v. West*, 23 Id. 385; *Barnes v. Means*, 82 Id. 379; *Gramm v. Boener*, 56 Ind. 497; *Tefft v. Wilcox*, 6 Kans.

is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care: there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result.²

§ 607. He is bound to have skill. — But a professed physician or surgeon is bound not only to use such skill as he has, but to have a reasonable degree of skill.¹ The law will not

46; *Smothers v. Hanks*, 34 Iowa, 286. In *McCandless v. McWha*, 22 Pa. St. 261; Woodward, J., said, that by reasonable skill and diligence the court meant "such as thoroughly educated surgeons ordinarily employ." Where one holds himself out to the public as a physician and surgeon, the law implies a promise and duty on his part that he will use reasonable skill and diligence in the treatment, and for the cure of those who may employ him (*Reynolds v. Graves*, 3 Wisc. 416; *Patten v. Wiggin*, 51 Me. 594).

²*Rich v. Pierpont*, 3 Fost. & F. 35; *Carpenter v. Blake*, 75 N. Y. 12. It is sufficient to sustain a recovery if there is evidence of any failure on defendant's part to exercise proper care, or of any neglect in the discharge of the duty he assumed toward the patient. It is not necessary to prove gross culpability (*Link v. Sheldon*, 136 N. Y. 1; 32 N. E. 696). As to liability of a professional nurse, see *Baker v. Wentworth*, 155 Mass. 338; 29 N. E. 589.

¹In *Carpenter v. Blake* (60 Barb. 488; 50 N. Y. 696; 10 Hun, 358; 75 N. Y. 12), plaintiff dislocated her elbow joint, and defendant, a surgeon, attempted to reduce the dislocation, but, either through negligence or want of skill, failed to do so, and in consequence plaintiff became

permanently crippled. A verdict for plaintiff was reversed for error in charging the jury "that it was entirely immaterial to the inquiry whether defendant, at the time he undertook the reduction of the dislocation, was or was not reputed to be, or was or was not, a skillful surgeon." On a second trial, plaintiff again obtained a verdict, which was affirmed, it being held not necessary that there should be proof of gross culpability on the part of a surgeon; that, having engaged in the performance of services requiring skill and care, he is liable for a want of the requisite skill or for an omission to exercise proper care, and that one who offers himself for employment in a professional capacity undertakes: (1) That he possesses that reasonable degree of learning and skill which is ordinarily possessed by the professors of the same art and science, and which is ordinarily regarded by the community, and by those conversant with the employment, as necessary to qualify him to engage in such business. (2) That he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge to accomplish the purpose for which he is employed. (3) That he will use his best judgment in the exertion of his skill and the

countenance quackery; and although the law does not require the most thorough education or the largest experience, it does require that an uneducated, ignorant man shall not, under the pretense of being a well qualified physician, attempt recklessly and blindly to administer medicines or perform surgical operations.² If the practitioner, however, frankly informs the patient of his want of skill, or the patient is in some other way fully aware of it, the latter cannot complain of the lack of that which he knew did not exist.³

§ 608. Standard of skill not absolute. — The standard of skill may vary according to circumstances, and may be different even in the same state or country. In country towns, and in unsettled portions of the country remote from cities, physicians, though well informed in theory, are but seldom called upon to perform difficult operations in surgery, and do not enjoy the greater opportunities of daily observation and practice which large cities afford. It would be unreasonable to exact from one in such circumstances that high degree of skill

application of his diligence. *S. P.*, *Smothers v. Hanks*, 34 Iowa, 286; *Patten v. Wiggin*, 51 Me. 594; *Smith v. Dumond*, 53 Hun, 637; 6 N. Y. Supp. 242; *Graves v. Santway*, 52 Hun, 613; 6 N. Y. Supp. 892. In *Bellinger v. Craigue* (31 Barb. 534), the obligation to use care and skill was held to be so essential a part of a doctor's title to compensation that a recovery of judgment for his services necessarily involved a determination that he had used due care, so as to bar any action upon his negligence; and this, notwithstanding all defense on the ground of negligence was expressly waived in the action brought by the doctor. *Mullin, J.*, dissented; and, as it seems to us, had the weight of reason upon his side. A medical man is bound to have the ordinary skill and judgment of members of his profession (*Hathorn v. Richmond*, 48 Vt. 557; *Barnes v. Means*, 82 Ill. 379; *McNevins v. Lowe*, 40 Id. 210; *Gates*

v. Fleischer, 67 Wisc. 504; 30 N. W. 674; *Simonds v. Henry*, 39 Me. 155; *Landon v. Humphrey*, 9 Conn. 200; *Small v. Howard*, 128 Mass. 131). But he is not bound to have more (*Howard v. Grover*, 28 Me. 97; *Smothers v. Hanks*, 34 Iowa, 286; see *Bowman v. Woods*, 1 Greene [Iowa], 441; *Gallaher v. Thompson, Wright* [Ohio], 466). An instruction that a physician must exercise such skill as is ordinarily exercised by educated physicians, without further defining it, is incorrect (*Hitchcock v. Burgett*, 38 Mich. 501).

² *Long v. Morrison*, 14 Ind. 595; *Ritchey v. West*, 23 Ill. 385; *Fowler v. Sergeant*, 1 Grant [Pa.], 355; *Wood v. Clapp*, 4 Sneed, 65.

³ A person not qualified as a regular medical practitioner, but assuming to practice as such, and undertaking to treat another for a disease, is liable for injury caused by his ignorance (*Ruddock v. Lowe*, 4 Fost. & F. 519).

which an extensive and constant practice in hospitals or large cities would imply a physician to be possessed of.¹ A physician, though inexperienced and unlearned, may in some circumstances undertake an operation, and in such case he is bound only to use the best skill he has; for, as has been remarked,² "many persons would be left to die if irregular surgeons were not allowed to practice."

§ 609. Test of skill.—None but the most general test of a physician's skill can be stated as rules of law. The great variance between the medical theories which find acceptance among different schools, each of which has its sincere and devoted adherents, and each being, in the estimation of its opponents, mere quackery, makes it impossible to assert, as a proposition of law, that any particular system affords an exclusive test of skill.¹ But one who professes to adhere to a

¹ An instruction that defendant was required to use only the degree of care and skill of the physicians in his neighborhood is not ground for reversal, there being evidence that there were other physicians in the neighborhood presumably of average ability, when compared with similar localities (*Pelky v. Palmer*, Mich. ; 67 N. W. 561). A charge that if, when defendant was called, both parties understood that he would treat plaintiff according to the approved practice of clairvoyant physicians, and if he did so treat him, with the ordinary skill and knowledge of the clairvoyant system, plaintiff could not recover, held, properly refused. Instead of the words, "with the ordinary skill and knowledge of the clairvoyant system," the instructions should have read, "with the ordinary skill and knowledge of physicians in good standing, practicing in that vicinity" (*Nelson v. Harrington*, 72 Wisc. 591; 40 N. W. 228). See *Barton v. Govan*, 116 N. Y. 658; 23 N. E. 556.

² *Rex v. Van Butchell*, 3 Carr. & P.

629; and see *McCandless v. McWha*, 22 Pa. St. 268. In *Rex v. Simpson* (4 Carr. & P. 407, note), Bayley, B., said: "If a person not of a medical education, *where professional aid might be obtained*, undertakes to administer medicine which might have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter." The text is quoted and approved in *Gramm v. Boener*, 56 Ind. 497. See *Bolt v. Murray*, 41 Hun, 638.

¹ Thus, in *Corsi v. Maretzek* (4 E. D. Smith, 1), it was held that a homeopathic physician stood upon an equality before the law with allopathic practitioners. And one who professed to follow the "botanic system" was held to have done all that could be asked of him by following its rules (*Bowman v. Woods*, 1 Green [Iowa], 441; and see *Commonwealth v. Thompson*, 6 Mass. 134; *Nelson v. Harrington*, 72 Wisc. 591; 40 N. W. 228 (note 1, § 608, *ante*). And yet it has been held, in North Carolina, that what is reasonable skill and due care in a physician,

particular school must come up to its average standard, and must be judged by its tests, and by the light of the present day.² Thus, a physician who should now practice the reckless and indiscriminate bleeding which was in high repute fifty years ago, or should shut up a patient in fever, and deny all cooling drinks, would doubtless find the old practice a poor excuse for his imbecility. So, if a professed homeopathist should violate all the canons of homeopathy, he would be bound to show some very good reason for his conduct, if it was attended with injurious effects. Upon many points of medical and surgical practice, all the schools are agreed; and indeed common sense and universal experience prescribe some invariable rules, to violate which may generally be called gross negligence.³

§ 610. Character of disease may determine degree of skill. — The state of health of the patient may have much weight in determining whether ordinary diligence and care have been used by the attending physician. What might be deemed ordinary care in some circumstances would be gross negligence in others. A disease known to be rapid and dangerous will require a more instant and careful attention and application of remedies, than one comparatively harmless, requiring only good nursing.¹

in the treatment of a patient, is a question of law, and it is error to leave it to be determined by the jury (*Woodward v. Hancock*, 7 Jones Law, 384). As to relative value of medical expert testimony in action for surgical malpractice, and where question is for the jury, see *Bennison v. Walbank*, 38 Minn. 313; 37 N. W. 447.

² In *Simonds v. Henry* (39 Me. 155), the court charged the jury "that if the plaintiff exercised all the knowledge and skill to which the art at that time had advanced, that would be all that would be required of him." But this was regarded as too high a standard of professional duty, and a new trial was ordered.

³ Thus a failure to remove the *placenta* after childbirth is highly culpable negligence (see *Lynch v. Davis*, 12 How. Pr. 323).

¹ Dr. Elwell, in his work on Malpractice (p. 28), observes: "It undoubtedly requires a higher degree of skill for the successful and safe treatment of *iritis* than that required in rheumatism, because, in the former case, the most important and delicate structure of the system is involved, the parts of which when affected with an inflammation may soon be destroyed, so rapid and dangerous is the disease, and unless treated intelligently and with great promptness, blindness quickly supervenes; while in rheumatism, but

§ 611. **Habits and tendencies of patient may determine degree of skill.**— Aside from the manipulation of a fractured limb, a surgeon has to contend with very many powerful and hidden influences, such as the habits, hereditary tendencies, vital force, mental state and local circumstances of the patient. While, on the one hand, these will explain his ill success and moderate the degree of his responsibility, it would seem that he is bound to inform himself of these facts, so far at least as they would be likely to influence, in the management of the case, the conduct of a prudent physician. We should say, for example, that a physician about to administer an anæsthetic, is bound to inform himself as to the condition of the patient's heart, lungs, or other organs, which, if diseased, would warn a prudent physician against the administration of that beneficent agency.¹

§ 612. **Physicians not liable for errors of judgment.**— A physician, like an attorney, is not answerable in a given case for the errors of an enlightened judgment;¹ but also, like an

little, perhaps nothing, can be done hastily, it being a disease of the joints and muscular system, usually requiring a long course of treatment, giving to the attending physician full time to study his case and apply his means of cure."

¹ See *Jones v. Fay*, 4 Fost. & F. 525.

¹ If he keeps within recognized and approved methods, he is not liable for mere errors of judgment (*Leighton v. Sargent*, 27 N. H. 460; *McClallen v. Adams*, 19 Pick. 333; *Du Bois v. Deckert*, 130 N. Y. 325; 29 N. E. 313; *Boldt v. Murray*, 41 Hun, 638; 2 N. Y. State, 232; *Wells v. World's Med. Asso.*, 9 N. Y. State, 452). But see *Howard v. Grover*, 28 Me. 97. In that case, the jury render a verdict against a surgeon for a large sum, "the alleged fault consisting in an *error of judgment* in not removing more of the limb." The court reduced the verdict merely: a decision we think not maintainable

either upon principle or authority (see *Twombly v. Leach*, 11 Cush. 397). The defendant, a surgeon, was employed by a railway company to examine the plaintiff, who had sustained an injury in a collision on its line; and having done so, so far as he could, he told the plaintiff that they were so slight that he accepted a small sum in compensation. Held that, even assuming his injuries were greater, there was no ground of action (*Pimm v. Roper*, 2 Fost. & F. 783). Plaintiff's attending physician, in good faith, but mistakenly, reported the case to the board of health as one of small-pox. Held, that the fact that defendants might have omitted to use ordinary skill in coming to their opinions would not render them liable for the involuntary removal of plaintiff, by the health inspector, to a small-pox hospital (*Brown v. Purdy*, 54 N. Y. Superior, 109). Under laws N. Y. 1874, ch. 446, providing that no person shall be

attorney, he cannot interpose his judgment contrary to that which is settled. He must apply, without mistake, what is settled in his profession. He cannot try experiments with his patients to their injury.²

§ 613. **Duty of continuing in attendance.**—The peculiar nature of the services which a medical man undertakes to render, often makes it his duty to continue them long after he would gladly cease to do so. He may, no doubt, decline absolutely to take charge of a case; but, having once begun the task, he cannot abandon it as freely. Even if his services are gratuitous, he must continue them until reasonable time has been given to procure other attendance; and, if he is not attending gratuitously, he has no right to desert a patient before the end of the illness which he undertook to treat, without reasonable cause. The propriety of this rule is obvious in some instances, and is easily demonstrable in all cases. Thus, no one can doubt that, even where his attendance was gratuitous, a surgeon could not be allowed to cut off a limb, and then leave the patient to stop the flow of blood as best he could; and this, although an extreme case, proves that there must be a rule adequate to secure justice for such a case. That a paid physician must continue his attendance, if desired, until the emergency which he was called to meet is past, seems to be not only reasonable in itself, but to be sustained by analogy from the rule which requires lawyers to conduct their clients' causes to trial and judgment after they have once undertaken them.¹

confined as a lunatic except on the sworn certificate of two physicians as to the fact of his insanity, made after personal examination, the physicians are liable for lack of ordinary care and prudence, and for failure to make due inquiry into the question of sanity, as their duties are not judicial (*Ayers v. Russell*, 50 Hun, 282; 3 N. Y. Sup. 338.)

² *Carpenter v. Blake*, 60 Barb. 488; *Tefft v. Wilcox*, 6 Kans. 46; *Patten v. Wiggin*, 51 Me. 594; see *Slater v. Baker*, 2 Wils. 359; *Rex v. Long*, 4 Carr. & P. 423. Willful negligence

must be proved in order to recover for it (*Wenger v. Calder*, 78 Ill. 275).

¹ See § 568, *ante*. In an action by a veterinary surgeon to recover for services in attending defendant's horse, proof that at the time of plaintiff's last visit the horse was very ill, and that plaintiff promised to call again early the next morning, but did not return at all, held sufficient to sustain a finding of negligence in treating the horse (*Boom v. Reed*, 69 Hun, 426; 23 N. Y. Supp. 421). After gelding a colt, defendant, a veterinary surgeon, was

If personal attendance is no longer necessary, *e. g.*, in the treatment of an injured limb, he should, if the case calls for it, give the patient instructions as to its care, and failure to do so is actionable negligence.²

§ 614. Evidence of negligence and burden of proof. —

The plaintiff must affirmatively prove all the elements of the negligence charged, including the defendant's want of knowledge or skill, where that is relied upon.¹ This may be done by proof of the mode of treatment pursued by the defendant in the particular case: if that indicates want of skill, it is not necessary to go outside the case for proof upon that point.²

bound to give the colt such continued further attention, after the operation, as the necessity of the case required (*Williams v. Gilman*, 71 Me. 21). See *Bemus v. Howard*, 3 Watts, 255 [pleading].

² *Beck v. German Klinik*, 78 Iowa, 696; 43 N. W. 617.

¹ It must be clearly shown that plaintiff's injury was the result of the want of care or skill of the defendant, and to entitle plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as to amount to a reasonable certainty that they will result from the original injury (*Smith v. Dumond*, 53 Hun, 637; 6 N. Y. Supp. 242). See *Strohm v. N. Y., Lake Erie, etc. R. Co.*, 96 N. Y. 306. s. p., *Scudder v. Crossan*, 43 Ind. 343; *Leighton v. Sargent* [N. H.], 11 Foster, 119; *Rowe v. Lent*, 62 Hun, 621, *mem.*; 17 N. Y. Supp. 131 [question for jury]. In an action for negligent treatment of a fractured limb, evidence as to the treatment of the plaintiff for bilious attacks caused in whole or in part by the shock to the system resulting from the fracture, and the confinement necessarily following, or induced by any other cause, is pertinent as showing whether the proper treat-

ment was employed to effect a speedy and permanent restoration of the fractured limb (*Kendall v. Brown*, 86 Ill. 387). Where the declaration does not allege general incompetency, plaintiff cannot recover on that ground, but must show that defendant did not properly exercise the skill which he in fact possessed, and it is error for court to refuse to instruct jury to that effect (*Mayo v. Wright*, 63 Mich. 32; 29 N. W. 832). See *Hanselman v. Carstens*, 60 Mich. 187; 27 N. W. 18 [pleading].

² *Ib.*; see *Carpenter v. Blake*, 60 Barb. 488. In an action against a surgeon, want of general skill not being imputed to defendant, and the jury having found for him on the question of negligence in the particular operation, the court refused a new trial (*Seare v. Prentice*, 8 East, 348). But Lord Ellenborough dissented from the language of the charge, "that unless negligence was proved, the jury could not examine into the want of skill." In an action against a surgeon for malpractice in attempting to deliver a wife of a child, it was averred that the defendant negligently omitted to deliver the wife for two days, contrary to the well-known rules of practice in such cases; and that the defendant did so ignorantly behave himself in

The defendant may, however, produce evidence of his general skill, where an issue is made upon his *possession* of skill, and not merely upon his *use* of it. And where there is much doubt as to the skillfulness of his treatment of the particular case, evidence of his general skillfulness will be material upon all the issues of the cause; for, if he had skill, it is natural to presume that he used it. But where the plaintiff does not question the defendant's general skillfulness, evidence thereof is not competent on behalf of the defendant, in a case not otherwise evenly balanced.³ But to rebut evidence introduced by the defendant to support his general professional character, it is competent to show that he was not a regularly bred physician.⁴ The fact that some surgeons approve of the practice adopted does not necessarily preclude a jury from condemning it as negligent, if the decided weight of authority is to that effect.⁵ When a disease resulting in death was caused by a surgical operation, the surgeons are not liable if they performed the operation with the consent of the deceased in a careful and skillful manner, and under the belief that it was proper to be performed.⁶

attempting to deliver the wife that she suffered great pain, and received lasting and irreparable injuries and wounds. Held, that particular acts of misconduct of defendant might be proved to sustain the general allegations; and plaintiff might show by what means such injuries and wounds were received (*Grannis v. Branden*, 5 Day, 260).

³ *Mertz v. Detweiler*, 8 Watts & Serg. 376; *Seare v. Prentice*, 8 East, 348. In action for malpractice in treating fractured leg, burden of proof to show want of proper skill is on plaintiff; and in such case, while skill of defendant, or want of it, is put in issue, his reputation in that respect is not put in issue, and evidence to establish it is properly excluded (*Holtzman v. Hoy*, 118 Ill. 534; see note to this case, 26 Am. Law Reg., March, 1887).

⁴ *Grannis v. Branden*. 5 Day, 260. In that case, it was also held

that evidence of the declaration of the defendant, that the cause of his difficulty was owing to the patient's having the venereal disease (it being proved that she did not have it), was admissible, only, however, for the purpose of showing the ignorance of the defendant as to the state of the case. In *Bute v. Potts* (76 Cal. 304: 18 Pac. 329), on the issue of incompetency, it was held that evidence that defendant procured his certificate of proficiency from the state board of examiners without examination, by means of diplomas irregularly obtained from medical schools, was irrelevant, as were also defendant's statements concerning such diplomas; the only question being as to the degree of care and skill in the particular case.

⁵ *Carpenter v. Blake*, 60 Barb. 488; compare s. c., 50 N. Y. 696.

⁶ *State v. Housekeeper*, 70 Md. 162; 16 Atl. 382.

§ 615. **Contributory fault.** — Where the plaintiff relies upon the fact of his non-recovery or slow recovery as some evidence of the defendant's unskillfulness or neglect, the defendant is at liberty to prove anything tending to show that the fault was in the patient, and not in the treatment. It is the duty of the patient to co-operate with his professional adviser, and to conform to proper and necessary prescriptions; and, if he will not, or, under the pressure of pain, cannot, his neglect is his own wrong or misfortune, for which he has no right to hold his surgeon responsible.¹ A patient's disobedience of instructions will not, however, relieve the physician from liability for the consequences of previous unskillful treatment; and the fact that plaintiff's injury was aggravated by such disobedience is no bar to his recovery, although it may properly be considered in assessing the damages.²

¹ *McCandless v. McWha*, 22 Pa. St. 261. If a patient neglects to obey the reasonable instructions of a surgeon, *e. g.*, to keep an injured limb in absolute rest, and thereby contributes to the injury complained of, he cannot recover (*Geiselman v. Scott*, 25 Ohio St. 86.) *S. P.*, *Hibbard v. Thompson*, 109 Mass. 236; *Chamberlin v. Morgan*, 68 Pa. St. 168; *Potter v. Warner*, 91 Id. 362; *Reber v. Herring*, 115 Id. 599; 8 Atl. 830; *Lower v. Franks*, 115 Ind. 334; 17 N. E. 630 [disobedience of instructions]. Where the plaintiff complained of delay in healing a broken leg, held proper for defendant to show that intemperance aggravated the evils of

such an accident, and that plaintiff had been an intemperate man for some years before his leg was broken (*McCandless v. McWha*, 25 Pa. St. 95). In that case, however, evidence of plaintiff's habits was confined to such a period as was first designated by the scientific witnesses as one within which intemperate habits would effect the patient's recovery in such a contingency. In any case, the burden of proving contributory negligence is on defendant (*Gramm v. Boener*, 56 Ind. 497).

² *DuBois v. Deckert*, 130 N. Y. 325; 29 N. E. 313; *aff'g* 52 Hun, 610; 4 N. Y. Supp. 768.

CHAPTER XXIX.

SHERIFFS AND CONSTABLES.

§ 616. Common-law liability.

617. Sheriff must owe a duty to plaintiff.

618. Liability for misconduct of deputy.

619. Diligence in executing process.

620. Inadequacy of levy.

§ 621. Safe-keeping of property.

622. Duty as to sale of property.

623. Liability for not returning writ; and false return.

624. Liability for insufficient sureties.

625. Liability for escape.

§ 616. **Common-law liability.** — Sheriffs and constables belong to that class of non-judicial public officers who do not act solely for the public at large, but mainly for individuals who employ them for a specific fee paid. Their duties are generally prescribed by statute; for their negligence or other official misconduct special statutory remedies are provided; and for particular breaches of duty special penalties are imposed. Such enactments do not, however, unless by their express terms, supersede the common-law liability to which every ministerial officer is subject. Therefore, a statute which gives an action of debt against a sheriff for an escape,¹ or for neglect to levy execution,² does not impair the common-law remedy of action on the case.

§ 617. **Sheriff must owe a duty to plaintiff.** — Before a party can maintain an action against a sheriff for official misconduct, he must show a legal duty to himself. It is not enough that in the careless discharge of his duty to one, the sheriff's negligence may glance off, and indirectly and remotely work injury to another.¹ Thus, a sheriff who proceeds to collect a judg-

¹ Bonafous v. Walker, 2 T. R. 126; ² Platt v. Sherry, 7 Wend. 236;
Homan v. Liswell, 6 Cow. 659; see Hayes v. Porter, 22 Me. 371;
Rawson v. Dole, 2 Johns. 454; Jen- White v. Wilcox, 1 Conn. 317.
ner v. Joliffe, 9 Id. 381; Wakefield ¹ Bank of Rome v. Mott, 17 Wend.
v. Moore, 65 Ga. 268. 554; South v. Maryland, 18 How.

ment for one creditor in so negligent a manner that the debtor's property is wasted, and the junior liens of another creditor are rendered worthless, is not liable to the junior creditor for the loss of his security,² except in case of a fraudulent intent on the part of the sheriff to diminish the security, in which case he will undoubtedly be liable.³

§ 618. Liability for misconduct of deputies. — All actions for breach of duty in the office of sheriff must be against the high-sheriff, though the default may have been committed by one of his deputies. The deputy's negligence is a matter to be settled between him and the sheriff.¹ And no action, unless given by statute, will lie against the deputy for a mere breach of duty in his office;² though he is personally liable for a trespass committed by him in the supposed discharge of his duty.³

(U. S.) 396; Harlan v. Lumsden, 1 Duval, 86; Moulton v. Jose, 25 Me. 76.

² Bank of Rome v. Mott, *supra*. Compare Hill v. Sewell, 27 Ark. 15.

³ Fairfield v. Baldwin, 12 Pick. 388; Ford v. Perkerson, 59 Ga. 359; see Chapman v. Thornburgh, 17 Cal. 87; Wilson v. Hillhouse, 14 Iowa, 199. A sheriff having attached goods of the debtor, is not bound, at the request of another creditor, to attach in his suit, under the same writ, other property of the debtor (Goddard v. Austin, 15 Mass. 133.)

¹ Cameron v. Reynolds, Cowp. 403; M'Intyre v. Trumbull, 7 Johns. 35; Harlan v. Lumsden, 1 Duval, 86; Watson v. Todd, 5 Mass. 271; Congdon v. Cooper, 15 Id. 10; Campbell v. Phelps, 17 Id. 244; Dow v. Rowe, 58 N. H. 125; Wheeler v. Thomas, 57 Ga. 161. The sheriff is responsible for all official neglect or misconduct of his deputy, and also for his acts, not required by law, where he assumes to act under color of office; but he is not responsible for the neglect of any act or duty which the law does not require the deputy offi-

cer to perform (Harrington v. Fuller, 18 Me. 277; Harriman v. Wilkins, 20 Id. 93).

² Cameron v. Reynolds, Cowp. 403; Paddock v. Cameron, 8 Cow. 212; Pond v. Vanderveer, 17 Ala. 426. But he, like any other agent, may make himself responsible by a special undertaking (Tuttle v. Love, 7 Johns. 470). S. P., Briggs v. Taylor, 28 Vt. 180; Jameson v. Mason, 12 Id. 599.

³ Where a sheriff is liable for the trespass of his deputy in the execution of process, both may be sued jointly for such wrongful act (Waterbury v. Westervelt, 9 N. Y. 598; King v. Orser, 4 Duer, 431). Compare Campbell v. Phelps, 1 Pick. 62; Moulton v. Norton, 5 Barb. 286; Knowlton v. Bartlett, 1 Pick. 271; Tobey v. Leonard, 15 Mass. 200; Waterhouse v. Waite, 11 Id. 207; Marshall v. Hosmer, 4 Id. 60; Heymann v. Cunningham, 51 Wisc. 506. A sheriff is liable for money received by his deputy on an execution, even after the sheriff's term of office has expired (Ross v. Campbell, 19 Hun, 615).

But the party in whose favor process issues may give such directions to the deputy as will not only excuse him from his general duty, but bind him to the performance of something different; and in such case the sheriff is not liable to such party for the deputy's negligence.⁴ Nor is he liable to a purchaser at an execution sale for declarations of a deputy making the sale, that the title to the subject of the sale was clear.⁵

§ 619. Diligence in executing process. — A sheriff to whom a valid process is issued is bound to exercise ordinary skill and diligence in its execution; and for any neglect to exercise such skill and diligence he is liable for any damages which the creditor¹ named in the process may have in consequence sustained; ²

⁴ *Root v. Wagner*, 30 N. Y. 9; *Godfrey v. Gibbons*, 22 Wend. 569; *Walters v. Sykes*, Id. 566; *Weld v. Chadbourne*, 37 Me. 221; *Mickles v. Hart*, 1 Denio, 548; see *Pepin v. Dunham*, 20 La. Ann. 88. If a deputy sheriff has authority from the creditor to manage an execution according to his discretion, the sheriff is discharged from his liability for the official neglect of such deputy (*Fletchers v. Bradley*, 12 Vt. 22; *Ordway v. Bacon*, 14 Id. 378; *Kimball v. Perry*, 15 Id. 414; *Samuel v. Commonwealth*, 6 Monr. 173; but see *New Hampshire Sav. Bank v. Varnum*, 1 Metc. 34; *Corning v. Southland*, 3 Hill, 552).

⁵ *Lewark v. Carter*, 117 Ind. 206; 20 N. E. 119.

¹ In *Hill v. Sewell* (27 Ark. 15) it was held that the sheriff was also liable to a surety for the principal debtor named in the execution.

² The diligence and effort required of an officer in whose hands a writ of attachment is placed for service are such diligence and effort as men ordinarily would exercise in their own business to protect their own rights and interests; and the fact that the writ was placed in his hands for service at 1 o'clock in the morn-

ing is sufficient to apprise him of the necessity of prompt action on his part, and if he does not exercise proper diligence and effort, he is guilty of negligence (*People v. Colerick*, 67 Mich. 362; 34 N. W. 683 [failure to perfect levy of attachment against, real estate]). *S. P.*, *Barnard v. Ward* 9 Mass. 269; *Pierce v. Partridge*, 3 Metc. 44; *Kittredge v. Bellows*, 7 N. H. 399; *Dorrance v. Commonwealth*, 13 Pa. St. 160; *Kirksey v. Pryor*, 13 Ala. 190; *Mathis v. Carpenter*, 95 Id. 156; 10 So. 341; *Neal v. Price*, 11 Ga. 297; *Sherrill v. Shuford*, 10 Ired. Law, 200; *Lawson v. State*, 10 Ark. 28; *Wolfe v. Dorr*, 24 Me. 104; *Kimball v. Davis*, 19 Id. 310; *Trigg v. McDonald*, 2 Humph. 386; *Cake v. Cannon*, 2 Houston, 426; *Watkinson v. Bennington*, 12 Vt. 404; *State v. Porter*, 1 Harringt. 126; see *Kinnard v. Willmore*, 2 Heisk. 619; *Lee v. Hardeway*, 6 Yerg. 502. After a sheriff's jury, on notice to creditor, has found the title to the property levied not in the judgment debtor, the sheriff is not bound to collect an execution out of it, except on tender of indemnity (*People v. Ames*, 35 N. Y. 482). Ordinarily the sheriff has until the return day named in the writ or pro-

but if all actual damage is clearly disproved, nominal damages cannot be recovered.³ A sheriff is liable for the willful act of

cess within which to execute it (Tucker v. Bradley, 15 Conn. 46); but where he has reason to believe that there will be danger of loss to the creditor in delaying the service, he is bound to make service as soon as he reasonably can (Ib.). If the plaintiff in the writ informs the officer of the danger of delay, and directs an immediate service, the sheriff is bound to follow such directions, and on failure is answerable for the consequences (Ib.; Pierce v. Partridge, 3 Metc. 44; Smith v. Judkins, 60 N. H. 127). For requisite proof to charge sheriff for not making money on execution, see Lyendecker v. Martin, 38 Tex. 287; Hunter v. Phillips, 56 Ga. 634. For various defenses, see Dawson v. Merchants' Bank, 30 Ga. 664; Porter v. Pierce, 19 Id. 268; Wilson v. Strobach, 59 Ala. 488; Bonnell v. Bowman, 53 Ill. 460; Terrell v. State, 66 Ind. 570; State v. Blanch, 70 Id. 204; Evans v. Thurston, 53 Iowa, 122; McNally v. Kerswell, 37 Me. 550; Abbott v. Jacobs, 49 Id. 319; Townsend v. Libbey, 70 Id. 162; Elmore v. Hill, 46 Wisc. 618. Burden of proof is on the officer (Moore v. Floyd, 4 Oreg. 101; Sage v. Dickinson, 33 Gratt. 361; Witowski v. Brennan, 41 N. Y. Superior, 284; Phelps v. Cutler, 4 Gray, 137). An agreement between the creditor and debtor, to suspend the levy of an execution, constitutes no defense to the officer in an action against him for not serving the execution delivered him (Derby Bank v. Landon, 2 Conn. 417). See Melhop v. Seaton, 77 Iowa, 151; 41 N. W. 600 [counsel for both parties agreed to release from levy]; Wilcox v. Brown, 26 Neb. 751; 42 N. W. 887; Hawkeye Lumber Co. v.

Diddy, 84 Iowa, 634; 51 N. W. 2 [pleading]. It being alleged that there was property which ought to have been seized, and which defendant had seized, but released, it is competent to show the true ownership of the property (Dornin v. McCandless, 146 Pa. St. 344; 23 Atl. 245). See State v. Harrington, 44 Mo. App. 297.

³ Wylie v. Birch, 4 Q. B. 566; Williams v. Mostyn, 4 Mees. & W. 145. But in default of any proof as to damage, nominal damages may be recovered (Clifton v. Hooper, 8 Jur. 958; Bales v. Wingfield, 4 Q. B. 580, n.; 2 Nev. & M. 831; Ledyard v. Jones, 4 Sandf. 67; Humphrey v. Hathorn, 24 Barb. 278; Pardee v. Robertson, 6 Hill, 550; Selfridge v. Lithgow, 2 Mass. 374). To maintain an action for negligence in the execution of mesne process, the plaintiff must show that he had a cause of action against the debtor; and in general, whatever evidence would be sufficient to charge the original party in a suit against him, will be admissible in an action against the sheriff (Sloman v. Herne, 2 Esp. 695; Parker v. Fenn, Id. 477, note; Alexander v. Macauley, 4 T. R. 611; Williams v. Bridges, 2 Stark. 42; Gibbon v. Coggon, 2 Campb. 188; Riggs v. Thatcher, 1 Greenl. 68). In such an action, the rule of damages is the injury actually caused by the officer's neglect (Palmer v. Gallup, 16 Conn. 556; Pierce v. Strickland, 2 Story, 292; Dyer v. Woodbury, 24 Me. 546). It is not sufficient that the debtor had property: it must also be shown that the officer did not use reasonable diligence to discover it (State v. Ownby, 49 Mo. 71; Fisher v. Gordon, 8 Mo.

his deputy in executing a second attachment prior to another entitled to a preference, whereby nothing is realized.⁴ He is not responsible for the use of more than ordinary diligence, nor bound to provide against unexpected contingencies.⁵

§ 620. **Inadequacy of levy.**—Where the debtor has sufficient property, within view of the sheriff, with which to satisfy the debt, it is negligence for the sheriff not to levy upon sufficient for that purpose.¹ In estimating the amount necessary for that purpose, he is bound to exercise a sound discretion, and having done so, he is not liable if it turns out to be insufficient; nor, on the other hand, is he liable to the debtor for an excessive levy, if it should turn out to be more than sufficient.² The mere inadequacy of the price which the property brings at the sale, if sold regularly without fraud, is not enough to sustain an action against the sheriff for an insufficient levy.³ A sheriff cannot, as a general rule, insist that the creditor in whose favor a process is issued shall search for, and point out, the debtor's property. But in the case of goods not in the debtor's possession, or of property the title to which is matter of record, it is reasonable to require that the creditor should point out such property.⁴ It has been held, therefore, that an officer is not liable to the creditor for not attaching real estate of the debtor which the creditor never directed him to attach.⁵

386; *Jacobs v. M'Donald*, 8 Id. 565; *Ganaway*, 8 Id. 625; *Adams v. Spangler*, 17 Fed. 133.

Haynes v. Tunstall, 5 Ark. 680; *Lawton v. Erwin*, 9 Wend. 233).

² *Commonwealth v. Lightfoot*, 7 B. Monr. 298.

⁴ The plaintiff in the writ is entitled to recover, in such case, the amount he would have received had the officer done his duty (*Grabenhaimer v. Budd*, 40 La. Ann. 107; 3 So. 724).

³ *Lynch v. Commonwealth*, 6 Watts. 495. It is enough if the levy was sufficient at the time it was made, notwithstanding that, before the day of sale, the property depreciated in value (*Governor v. Carter*, 3 Hawks, 328).

⁵ *Hodgson v. Lynch*, Irish R. 5 C. L. 353; *Parrott v. Dearborn*, 104 Mass. 104; *Batto v. Chandler*, 53 Tex. 613; *Crosby v. Hungerford*, 59 Iowa, 712; 12 N. W. 582.

⁴ See *Bond v. Ward*, 7 Mass. 123; *Perley v. Foster*, 9 Id. 112.

¹ *Ransom v. Halcott*, 18 Barb. 56; *Pitcher v. King*, 5 Q. B. 758; *Governor v. Powell*, 9 Ala. 83; *Griffin v.*

⁵ *Palmer v. Gallup*, 16 Conn. 555. Otherwise in Maine (*Betts v. Norris*, 15 Me. 468).

§ 621. **Safe-keeping of property.**—Having taken into his possession the goods of the debtor, the sheriff is bound to exercise, in respect to their safety and preservation, that degree of care and prudence which a man of ordinary discretion and judgment might reasonably be expected to exercise in reference to his own property.¹ He is not an insurer of the goods, but is regarded as an ordinary bailee for the purpose of custody and sale; and the principles governing that class of bailments are, therefore, applicable in the case of sheriffs.² If he keeps the goods on which he has levied in an unsafe place, or exposes them to destruction, he is liable, in case they are lost or destroyed.³ He is not liable, if the goods are casually destroyed by fire,⁴ or are taken from him without any want of ordinary care on his part.⁵ If the sheriff, as is frequently the case, leaves the goods with the debtor, taking the receipt of some third person, he assumes the risk of answering to the creditor if the goods are lost through the ordinary negligence or fraud of the debtor or of the receiptor.⁶

§ 622. **Duty as to sale of property.**—Having taken property under an execution, the sheriff is bound to proceed to sell it with reasonable expedition,¹ and at public auction.² If through his delay the property is lost, or depreciated in value, or, the debtor becoming bankrupt, the title to the property levied on passes to his assignee, the sheriff is liable to the exe-

¹ Jones v. McGuirk, 51 Ill. 382; Eastman v. Judkins, 59 N. H. 576; Lambeth v. Joffrion, 41 La. Ann. 749; 6 So. 558 [plantation with growing crops].

² Browning v. Hanford, 5 Hill, 588, 591; Moore v. Westervelt, 27 N. Y. 234. s. c., previously, 2 Duer, 59; 1 Bosw. 357; 21 N. Y. 103; see, also, Abbott v. Kimball, 19 Vt. 551; Hale v. Huntley, 21 Id. 147; Bridges v. Perry, 14 Id. 262; Conover v. Commonwealth, 2 A. K. Marsh. 566; Owens v. Gatewood, 4 Bibb, 494.

³ Jenner v. Joliffe, 9 Johns. 381; 6 Id. 9.

⁴ Browning v. Hanford, 5 Hill, 588.

⁵ Bridges v. Perry, 14 Vt. 262; Wood v. Bodine, 32 Hun, 354; Briggs v. Dearborn, 99 Mass. 50.

⁶ Higgins v. Kendrick, 14 Me. 83; Parrott v. Dearborn, 104 Mass. 104. If the receiptor is nominated by the creditor himself, he, and not the sheriff, is responsible for the fidelity of such bailee (Donham v. Wild, 19 Pick. 520; Rice v. Wilkins, 21 Me. 558).

¹ Jacobs v. Humphrey, 2 Cr. & M. 413; State v. Herod, 6 Blackf. 444; Janvier v. Vandever, 3 Harringt. 29; Dorrance v. Commonwealth, 13 Pa. 160; Kimbro v. Edmondson, 46 Ga. 130.

² Sheehy v. Graves, 58 Cal. 449.

cution creditor.³ He is bound to conduct the sale according to the requirements of the law, and with reasonable prudence and skill. Thus he is liable for neglect in not complying with a law requiring notices of the sale of real estate to be put up in two towns adjoining the land.⁴ And he can accept only cash for the purchase price.⁵

§ 623. **Liability for not returning writ, and for false return.**—At common law, no action would lie against the sheriff for not returning an execution or other writ.¹ The practice was to compel a return by attachment, and seek a remedy upon that, if false. But in New York, and in most if not all of the other states, the statute gives to the creditor an action against the sheriff for not returning the writ. Under such a statutory right, the sheriff is *prima facie* liable for the whole debt, if he neglects to return the writ within the return day.² No attachment or notice to the sheriff to return the execution is necessary to give the right of action: the mere omission

³ *Aireton v. Davis*, 9 Bing. 740; *Bales v. Wingfield*, 2 Nev. & M. 831; *Carlile v. Parkins*, 3 Stark. 163; *Fisher v. Vanmeter*, 9 Leigh, 18. So if an officer levies upon property which he advertises for sale, but neglects to sell, he becomes a trespasser *ab initio* (*Bond v. Wilder*, 16 Vt. 393; and see *Jordan v. Gallup*, 16 Conn. 536).

⁴ *Sexton v. Nevers*, 20 Pick. 451. A sheriff is liable to an execution debtor for his officer's negligence in not properly lotting, at a sale, the goods seized (*Wright v. Child*, L. R. 1 Exch. 358). An execution creditor cannot, however, complain of the loss of the property by reason of an adjournment of the sale, which was authorized by himself, nor of a delay caused by an injunction against the sale, nor even after a dissolution of the injunction, unless security is given, if required (*Conway v. Jett*, 3 Yerg. 481; *Paterson Bank v. Hamilton*, 13 N. J. Law, 159; *Le Roy v. Blauvelt*, Id. 341).

⁵ *Robinson v. Brennan*, 90 N. Y. 208 [sheriff took check for amount of bid; check not paid; upon resale less amount was bid; sheriff liable for difference]. See *Cramer v. Oppenstein*, 16 Colo. 504; 27 Pac. 716.

¹ *Moreland v. Leigh*, 1 Stark. 388, and note; *Commonwealth v. McCoy*, Watts, 153; *Clark v. Foxcroft*, 6 Greenl. 296; see *Commonwealth v. Magee*, 8 Pa. St. 240; *Pardee v. Robertson*, 6 Hill, 550.

² *Swezey v. Lott*, 21 N. Y. 481; *Pardee v. Robertson*, 6 Hill, 550; *Ledyard v. Jones*, 4 Sandf. 67; 7 N. Y. 550; *Bank of Rome v. Curtiss*, 1 Hill, 275; *Peck v. Hurlburt*, 46 Barb. 559; *Bowman v. Cornell*, 39 Id. 69; *Burk v. Campbell*, 15 Johns. 456; *Stevens v. Rowe*, 3 Denio, 327; *Dygert ads. Crane*, 4 Wend. 534; *Jenkins v. McGill*, 4 How. Pr. 205; *Wilson v. Wright*, 9 Id. 459; *McGregor v. Brown*, 5 Pick. 170; *Johnston v. Gwathney*, 2 Bibb, 186.

creates it;³ and in all cases the *onus* is on the sheriff to excuse the default.⁴ He is bound to return the writ, whether he has served it or not,⁵ and to return it to the proper office;⁶ and for making a false return, he is *prima facie* liable to the creditor for the amount of the debt with interest,⁷ and is liable to any one else, though not a party to the suit, who is damaged by the return.⁸

§ 624. **Liability for insufficient sureties.**—Where it is the duty of an officer to take proper and sufficient bail for the appearance of a party, or security for the return of property, he is liable in damages if he omits to do so, or if he carelessly and negligently accepts sureties who are insufficient. Thus, if a sheriff releases a debtor from arrest without taking bail from him,¹ or takes a bail bond which is forged,² or surrenders

³ *Corning v. Southland*, 3 Hill, 552; *Burk v. Campbell*, 15 Johns. 456; *Brookfield v. Remsen*, 1 Abb. Ct. App. 210. In Louisiana, the sheriff is liable, on rule, after ten days' notice (*Taylor v. Hancock*, 19 La. Ann. 466).

⁴ *Wilson v. Wright*, 9 How. Pr. 459.

⁵ *Webster v. Quimby*, 8 N. H. 382; *Kidder v. Barker*, 18 Vt. 454.

⁶ A sheriff having served a writ of attachment, returned it to the house of the clerk, and the clerk not being at home, left it with his wife, and informed her what it was. The writ was never entered on the docket of the court, by reason of which the creditor could not obtain judgment, and lost the greater part of his debt. Held, that the sheriff was not liable (*Frink v. Scovel*, 2 Day, 480).

⁷ *McArthur v. Pease*, 46 Barb. 423; *Beckford v. Montague*, 2 Esp. 475; *Goodrich v. Starr*, 18 Vt. 227; *Palmer v. Crane*, 8 Mo. 619; *Barnard v. Leigh*, 1 Stark. 43; *Brydges v. Walford*, 6 Maule & S. 42; *Beynon v. Garrat*, 1 Carr. & P. 154; *Glossop v. Pole*, 3 Maule & S. 175. As to

whether a sheriff is liable for an insufficient return, see *Goodwin v. Smith*, 4 N. H. 29. To render an officer liable for a false return, an averment "that he failed to make a true and correct return" is insufficient (*Commonwealth v. Bartlett*, 7 J. J. Marsh. 161). If a sheriff makes a fair, honest effort to determine whether the execution-defendant has any property on which he can levy, but is unable to find any, he is justified in making a return of *nulla bona*. It is a good defense that he had applied all the avails of the property found to prior executions (*Cross v. Williams*, 63 How. Pr. 191).

⁸ *Heywood v. Hildreth*, 9 Mass. 393.

¹ *Crane v. Warner*, 14 Vt. 40.

² *Marsh v. Bancroft*, 1 Metc. 497. An officer is not liable for returning a bail bond signed by defendant and only one surety, if the latter is sufficient (*Glezen v. Rood*, 2 Metc. 490). Of course, if an arrest is unauthorized, no action will lie against the officer by the creditor for neglecting to take sufficient bail (*Mason v. Hutchings*, 20 Me. 77).

property on a replevin bond without inquiring into the sufficiency of the sureties, or compelling them to justify, he is liable for any damages thereby caused to the creditor.³ It has been held in England that a sheriff is justified in accepting as a surety one who appears to the world as a person of responsibility, without making inquiries.⁴ But notwithstanding an appearance of respectability, and a general reputation for solvency, if the sheriff knows that a surety is of doubtful solvency, or if he has means of informing himself as to the surety's sufficiency, and neglects to do so, he is liable, if in fact the surety is insufficient.⁵ If the sureties proposed are unknown to him, he ought to take means to inform himself as to their sufficiency, and not to rely solely on their own sworn statements.⁶ Where a statute makes the sheriff responsible for sureties accepted by him, no degree of prudence in acceptance will relieve him from responsibility.

§ 625. Liability for escape.—At common law, the only remedy for an escape of debtors arrested on civil process was by an action on the case;¹ but statutes have been enacted in England and in many states giving an action of debt against a sheriff for an escape of a debtor taken on final process. These statutes do not, unless they contain express language to that effect, take away the common-law remedy.² They give to the creditor a right to recover, irrespective of the actual damage, the precise amount of the original judgment, as a penalty.³

³ *Noble v. Desmond*, 72 Cal. 330; 14 Pac. 16.

⁴ *Hindal v. Blades*, 1 Marsh. 27; 5 Taunt. 225; see *Sutton v. Waite*, 8 J. B. Moore, 27.

⁵ *Scott v. Waithman*, 3 Stark. 168; *Saunders v. Darling*, Bull. N. P. 60.

⁶ *Jeffrey v. Bastard*, 4 Ad. & El. 823. And the penalty of the bond is the limit of the damages (see *Newbert v. Cunningham*, 50 Me. 231; *Young v. Hosmer*, 11 Mass. 89; *Shackford v. Goodwin*, 13 Id. 187; *Gerrish v. Edson*, 1 N. H. 82; *Robinson v. People*, 8 Ill. App. 279).

¹ See *Rawson v. Dole*, 2 Johns. 454;

Thomas v. Weed, 14 Id. 255; *Littlefield v. Brown*, 1 Wend. 398; *Duncan v. Klinefelter*, 5 Watts, 141, 144; *Steere v. Field*, 2 Mason, 513.

² *Barnes v. Willet*, 35 Barb. 514.

³ *Bensel v. Lynch*, 44 N. Y. 162; *Barnes v. Willet*, 11 Abb. Pr. 225; and see *Rawson v. Dole*, 2 Johns. 454; *Van Slyck v. Hogeboom*, 6 Id. 270; *Renick v. Orser*, 4 Bosw. 384; *McCreery v. Willett*, Ib. 643; *Hutchinson v. Brand*, 9 N. Y. 209; *Porter v. Sayward*, 7 Mass. 377; *Shewel v. Fell*, 3 Yeates, 17; 4 Id. 47; *Jones v. Blair*, 4 McCord, 281; *Futch v. Walker*, 1 Bailey, 98. Proof of the

A sheriff who discharges a prisoner on an order of court, which on its face fails to recite the requisite jurisdictional facts, is liable for an escape, unless he shows the court had in fact jurisdiction.⁴

officer's good faith or that the debtor was insolvent is immaterial (Zenner v. Blessing, 4 N. Y. Supp. 866).⁴ Shaffer v. Riseley, 114 N. Y. 23; 20 N. E. 630.

PART VII.

MANAGEMENT OF PROPERTY.

CHAPTER XXX. CARE OF ANIMALS.

XXXI. DRIVING AND RIDING.

XXXII. FENCES.

XXXIII. FIRE.

XXXIV. EXPLOSIVES, MACHINERY AND MISCELLANEOUS CASES.

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XXXVI. LAND AND STRUCTURES.

XXXVII. WATER AND WATER-COURSES.

CHAPTER XXX.

CARE OF ANIMALS.

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| <p>§ 626. Owner's liability for injuries committed by animals.</p> <p>627. Owner's liability for animal's trespass.</p> <p>628. Owner's notice of disposition of animal.</p> <p>629. Presumption of notice of disposition.</p> <p>630. What deemed sufficient notice.</p> <p>631. What kind of notice necessary.</p> <p>632. Sufficient evidence of notice.</p> <p>633. Keeping infectiously diseased animals.</p> <p>634. Animals running at large.</p> | <p>§ 635. Who will be deemed owner of animal.</p> <p>636. Ownership of animal; how proved.</p> <p>637. Imputed knowledge of animal's habits.</p> <p>638. Separate owners; when jointly liable.</p> <p>639. Contributory negligence.</p> <p>640. Driving trespassing animals off land.</p> <p>641. Negligence in impounding cattle.</p> <p>642. [Omitted.]</p> <p>643. Injuries to a dog fighting another.</p> |
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§ 626. Owner of animals liable for injuries committed by them. — The owner of an animal is liable for injuries which by his negligence he suffers it to commit; and, except in some

cases provided for by statute (which will be hereafter separately considered), he is not liable for the acts of the animal upon any other ground than that of negligence, actual or presumed.¹ If he has done all that he or any other man in his circumstances reasonably could, to prevent injury, he is not liable ;² he is only answerable for the want of ordinary care.³ The mere keeping of a ferocious dog, known to be such, for the purpose of defending its owner's premises, is not in itself unlawful ; his liability for an injury done by a dog so kept depends upon the manner of its confinement and the circumstances attending the injury.⁴ So a purely accidental and involuntary injury by an

¹ *Van Leuven v. Lyke*, 1 N. Y. 515 ;
⁴ *Denio*, 127 ; *Wheeler v. Brant*, 23
Barb. 324 ; *Buckley v. Leonard*, 4
Denio, 500 ; *Drake v. Mount*, 33 N. J.
Law, 441 ; *Roehers v. Remhoff*, 55 *Id.*
475 ; 26 *Atl.* 860 [dog] ; *Moulton v.*
Scarborough, 71 *Me.* 267 [ram al-
lowed at large] ; *Clanin v. Fagan*, 124
Ind. 304 ; 24 N. E. 1044 [pleading].

² *Scribner v. Kelley*, 38 *Barb.* 14 ;
Earl v. Van Alstine, 8 *Id.* 630 ; *Cooke*
v. Waring, 2 *Hurlst. & C.* 332 ; see
Tift v. Tift, 4 *Denio*, 175 ; *May v.*
Burdett, 9 *Q. B.* 101.

³ *Meredith v. Reed*, 26 *Ind.* 334 ;
Frazer v. Kimler, 2 *Hun.* 514 ; *Dol-*
finger v. Fishback, 12 *Bush*, 474 ;
Chicago, etc. R. Co. v. Fenn, 3 *Ind.*
App. 250 ; 29 N. E. 790. The mere fact
that a person attending an exhibi-
tion of horse-racing is run over by a
runaway horse does not render the
person maintaining the racing course
liable for the injuries (*Hart v. Wash-*
ington Park Club, 54 *Ill. App.* 480).

⁴ *Woodbridge v. Marks*, 17 N. Y.
App. Div. 139 ; 45 N. Y. *Supp.* 156.
In that case, defendant, for the pro-
tection of buildings in the rear of his
premises, kept two watch dogs fast-
ened by chains, which practically con-
fined them within a space into which
no stranger, could be expected to
come. Held, that keeping such dogs
was not maintaining a nuisance,

and did not render him negligent
as to a person who, at night, passed
through an orchard in which there
was no path. See s. c., 5 *App. Div.*
604 ; 40 N. Y. *Supp.* 728 [demurrer].
One is not liable for the damages
caused by his dog, though he knows
he is vicious, if he exercises proper
care and diligence to secure him so
that he will not injure any one who
does not unlawfully provoke or inter-
meddle with him (*Worthen v. Love*,
60 *Vt.* 285 ; 14 *Atl.* 461) ; *Reed v.*
Southern Express Co., 95 *Ga.* 108 ; 22
S. E. 133 [horse, momentarily left
standing in a street, bit passer-by on
sidewalk ; horse was vicious ; owner
not liable]. Even in actions under a
statute imposing liability "for all
damages that may be sustained" by
animals running at large, it is a good
defense that the owner had properly
secured the animal, but it had broken
out at night without defendant's
knowledge or default (*Briscoe v.*
Alfrey, 61 *Ark.* 196 ; 32 *S. W.* 505
[an unaltered mule]). If the owner of
a dangerous, but domestic, animal
keeps it properly secured, he is not
liable for injuries committed by it
upon its being let loose by another
person (not being his servant) with-
out his authority (*Fleeming v. Orr*,
2 *Macq. H. L.* 14). It is a good de-
fense that while defendant was law-

animal is not actionable, as where a dog, in play, leaped over a fence and fell on plaintiff,⁵ or where two colts, meeting at a fence which divided them, reared in sport, and one of them fell on the fence and was killed.⁶ In any case, the owner's negligence must have been the proximate cause of plaintiff's injury.⁷

§ 627. **Owner's liability for animal's trespass.**—The owner of large animals (such as horses, oxen, sheep, etc.¹) is under an unqualified obligation, at common law, to restrain them from trespassing upon the land of other persons. And he is, therefore, unconditionally liable as a trespasser himself, for any trespass committed by his animate property:² the law conclusively presuming negligence against him, without regard to the facts of the particular case. Whatever damage his animal does, while trespassing, is an aggravation of the trespass,

fully leading cow through the streets she was set upon by dogs, and escaped from his control, and while so at large inflicted the injury (*Moy-nahan v. Wheeler* 117 N. Y. 285; 22 N. E. 702) [statutory action.]

⁵*Sanders v. Teape*, 51 L. T. N. S. 263; *Jones v. Owen*, 24 Id. 587. Otherwise, under a statute which makes the owner of a dog "liable to any person injured by it;" it being immaterial, then, whether the injury was done in play or with vicious intent (*Hathaway v. Tinkham*, 148 Mass. 85; 19 N. E. 18).

⁶*Johanson v. Howells*, 55 Minn. 61; 56 N. W. 460 [fact that defendant's colt was running at large would not change the rule].

⁷Defendant's cow escaped from his premises without his negligence, and entered plaintiff's barn through a door which had been left open. The sleepers of the floor were rotten, and gave way under the weight of the cow. Soon afterwards, plaintiff entered the barn, and fell through the hole made by the cow. Held, that the injuries resulting from such fall were not the proximate result of the tres-

pass by defendant's cow (*Hollenbeck v. Johnson*, 79 Hun, 499; 29 N. Y. Supp. 945). To same effect, *Smith v. French*, 83 Me. 108; 21 Atl. 739.

¹The rule does not extend to dogs (*Brown v. Giles*, 1 Car. & P. 118; *Read v. Edwards*, 17 C. B. N. S. 245; *O'Connell v. Jarvis*, 13 N. Y. App. Div. 3; 43 N. Y. Supp. 129).

²*Lee v. Riley*, 18 C. B. N. S. 722; *Van Leuven v. Lyke*, 1 N. Y. 515; *Dunckle v. Kocker*, 11 Barb. 387; *Stafford v. Ingersol*, 3 Hill, 38; *Malone v. Knowlton*, 60 Hun, 585, *mem.*; 15 N. Y. Supp. 506; *Myers v. Parker*, 74 Hun, 129; 26 N. Y. Supp. 308; *Lyons v. Merrick*, 105 Mass. 71; *Angus v. Radin*, 2 South. 815; *Dolph v. Ferris*, 7 Watts & S. 367; *Page v. Hollingsworth*, 7 Ind. 317; *Beckwith v. Shordike*, 4 Burr. 2092; see *Cox v. Burbridge*, 13 C. B. N. S. 430, 438, per Williams, J. Even the fact that defendant's animal was unlawfully taken out of his close by a stranger is no defense, if, after being left by the stranger, it strayed upon plaintiff's close (*Noyes v. Colby*, 30 N. H. 143).

for which he is also liable;³ but he is not liable for the acts of other animals, following through a breach made in an inclosure by his cattle.⁴ The modification of this rule, by the laws of various states concerning the maintenance of fences, will be considered in the chapter on Fences.⁵

§ 628. Owner's notice of disposition of animal. — To charge the owner of an animal for an injury committed by it when not trespassing,¹ it is necessary, at common law, to allege and prove that he had previous notice that its disposition was such as to make it probable that it would commit injuries of a similar character, and that he failed to take proper precautions² against such acts on its part. The responsibility, for example, of the owner of a ferocious dog, does not depend upon a ques-

³ Cases cited in last note. The communication of an infectious disease by trespassing cattle is such manner of aggravation (*Barnum v. Vandusen*, 16 Conn. 200; *Anderson v. Buckton*, 1 Strange, 192). Defendant's horse, loose upon the highway, broke into plaintiff's close, and killed the latter's horse. Held, defendant liable, though he had no knowledge of the viciousness of his horse (*Decker v. Gammon*, 44 Me. 322). See also *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10; *Mason v. Morgan*, 24 Upp. Can. [Q. B.], 328; *Duggan v. Hansen*, 43 Neb. 277; 61 N. W. 622 [defendant's bull escaped into adjoining premises, owner of, which agreed to let it remain over night, where it killed a third person's horse pastured there; owner liable under statute.]

⁴ *Durham v. Goodwin*, 54 Ill. 469.

⁵ See § 655 *et seq.*, *post*.

¹ Where the injury was committed while the cow was negligently permitted to trespass on plaintiff's premises, *scienter* need not be alleged (*Mosier v. Beale*, 43 Fed. 358).

² *Rider v. White*, 65 N. Y. 54; *Wheeler v. Brant*, 23 Barb. 324; *Buckley v. Leonard*, 4 Denio, 500; *Loomis v. Terry*, 17 Wend. 496; Ro-

ney v. Ward, 2 Daly, 295; *Evans v. McDermott*, 49 N. J. Law, 163; 6 Atl. 653; *Smith v. Donohue*, 49 N. J. Law, 548; 10 Atl. 150; *Woolf v. Chalker*, 31 Conn. 121; *Kittredge v. Elliott*, 16 N. H. 77; *Coggswell v. Baldwin*, 15 Vt. 404; *Stumps v. Kelley*, 22 Ill. 140; *Norris v. Warner*, 59 Ill. App. 300 [dog]; *Robinson v. Marino*, 3 Wash. St. 434; 28 Pac. 752 [dog]; *Meegan v. McKay*, 1 Okl. 59; 30 Pac. 232 [mule]; *Finney v. Curtis*, 78 Cal. 498; 21 Pac. 120 [horse]; *Laverone v. Mangianti*, 41 Cal. 138 [dog]. In *Earhart v. Youngblood* (27 Pa. St. 331), *Lowrie, J.*, said: "The rule is very plain and very just that the owner of an animal known to be vicious must take sufficient precautions that it shall do no injury to the public; it must be so confined that strangers may pursue their own objects with security from it. The public are entitled to act upon the presumption that all dangerous animals are properly confined, and are, therefore, exonerated from any special caution against them, except when, without right, they go upon their owner's land, and within the place where they may be lawfully kept."

tion of negligence: the permitting of such an animal to go at large is a willful wrong.³ This liability of the owner is not confined to acts proceeding from a vicious disposition in the animal; although the rule is often so stated as to create this impression. He is as much bound to take precautions against injuries which the animal may commit in mere playfulness, as against those which spring from a vicious intent.⁴ In England,⁵ and in many of the states of this country, the common-law rule requiring averment and proof of *scienter*, as against owners of dogs, has been abrogated by statute, and a stricter liability has been imposed than that of the common law.⁶

³ *Lynch v. McNally*, 7 Daly, 126; *aff'd*, 73 N. Y. 347; *Muller v. McKesson*, Id. 195. See *Congress Spring Co. v. Edgar*, 99 U. S. 645; *Murray v. Young*, 12 Bush, 337. Compare *Scribner v. Kelley*, 38 Barb. 14; *Van Leuven v. Lyke*, 1 N. Y. 515; *Cox v. Burbridge*, 13 C. B. N. S. 430; *Brooks v. Taylor*, 65 Mich. 208; 31 N. W. 837; *Kennett v. Engle*, 105 Mich. 693; 63 N. W. 1009 [that dog's general disposition is peaceable is immaterial].

⁴ Thus, if the owner of a horse knows that it is given to kicking in mere sport, it is as much his duty to restrain it from doing injury thereby as it would be if it kicked from bad temper and malice (*Dickinson v. McCoy*, 39 N. Y. 400). s. p., *Line v. Taylor*, 3 Fost. & F. 731 [mischievous dog]; *Evans v. McDermott*, 49 N. J. Law, 163; 6 Atl. 653 [same]; *Snow v. McCracken*, Mich. ; 64 N. W. 866 [habit of chasing fowls].

⁵ 26 & 27 Vict. c. 100; 28 & 29 Vict. c. 60; *Wright v. Pearson*, L. R. 4 Q. B. 582. Under the last-mentioned statute, a recovery may be had without evidence of any mischievous propensity in the dog, or of any negligence on the part of the owner.

⁶ So in *Maine* (*Smith v. Montgomery*, 52 Me. 178; *Prescott v. Knowles*, 62 Id. 277); *New Hampshire* (*Orne v.*

Roberts, 51 N. H. 110); *Vermont* (*Adams v. Hall*, 2 Vt. 9); *Massachusetts* (*Mitchell v. Clapp*, 12 Cush. 278 [under statute giving double damages]; *Le Forest v. Tolman*, 117 Mass. 109; *Buddington v. Shearer*, 20 Pick. 477 [each owner liable only for the injury committed by his own dog]; *Sherman v. Favour*, 1 Allen, 191 [statute applies to case of dog frightening horse]; *Brewer v. Crosby*, 11 Gray, 29; [statute applies to case of injury to property]; as to injury to persons, see *Searles v. Ladd*, 123 Mass. 580; *Munn v. Reed*, 4 Allen, 431; *Barrett v. Malden*, etc. R. Co., 3 Id. 101; *Osborn v. Lenox*, 2 Id. 207); *Connecticut* (*Woolf v. Chalker*, 31 Conn. 121; *Jones v. Sherwood*, 37 Id. 466); *New York* (*Fish v. Skut*, 21 Barb. 333; *Osincup v. Nichols*, 49 Id. 145; *Auchmuty v. Ham*, 1 Denio, 495); *Delaware* (Rev. Code [1852], c. 51, § 10); *Pennsylvania* (*Paff v. Slack*, 7 Pa. St. 254; *Campbell v. Brown*, 19 Id. 359; *Kerr v. O'Connor*, 63 Id. 341); *Maryland* (Code [1860], 595, §§ 1, 2); *Ohio* (*Gries v. Zeck*, 24 Ohio St. 329 [person bitten by dog]; *Job v. Harlan*, 13 Id. 485 [worrying sheep]; *McAdams v. Sutton*, 24 Id. 333); *Illinois* (*Brent v. Kimball*, 60 Ill. 211; *Spray v. Ammerman*, 66 Id. 309; compare *Norris v. Warner*, 59 Ill. App. 300);

§ 629. **Presumption of notice of disposition.** — For the purposes of a civil action, every person in possession of an animal is conclusively presumed to have notice of the disposition and habits which are universal among that *species* of animals;¹ but there is no presumption of any kind as to his knowledge of the disposition or habits peculiar to his particular animals. Therefore, the owner of wild and savage beasts, such as lions, tigers, wolves, bears, etc., if he neglects to keep them properly secured, is liable for injuries committed by them according to their nature, without any evidence that he knew them to be ferocious,² or that he was negligent in his mode of keeping them;³ since he is bound in ordinary prudence to know that fact, and to secure them from doing harm. But the owner of creatures which, as a species, are harmless and domesticated,

Michigan (Swift v. Applebone, 23 Mich. 252 [double damages]; Elliott v. Herz, 29 Id. 202 [statute does not apply to mad dogs]; see Trompen v. Verhage, 54 Id. 304); *Wisconsin* (Slinger v. Henneman, 38 Wis. 504; Tenney v. Lenz, 16 Id. 566); *Alabama* (Smith v. Causey, 22 Ala. 568); *North Carolina* (Wallace v. Douglas, 10 Ired. Law, 79 [statute requiring owner to kill mad dog construed]); *California* (Rev. St. 1865, c. 227, § 4).

¹ *Bosoizzi v. Harris*, 1 Fost. & F. 92. This is evidently the principle upon which the decisions on this subject rest, though we do not find it anywhere stated in precisely this form. In *Van Leuven v. Lyke* (1 N. Y. 515), the rule is stated thus: "It is a well-settled principle that in all cases where an action of trespass on case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous;

and such notice must be alleged in the declaration; but as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do, without notice, on the ground that by nature such animals are fierce and dangerous."

² So held, in the case of a bear which was confined by a chain and had for a long time been tame and docile in its habits (*Besozzi v. Harris*, 1 Fost. & F. 92; *Marquet v. LaDuke*, 96 Mich. 596; 55 N. W. 1006), and in case of elephant on exhibition (*Filburn v. People's Palace Co.*, 25 Q. B. Div. 258); and of a wolf on defendants premises fed from their butcher shop (*Manger v. Shipman*, 30 Neb. 352; 46 N. W. 527).

³ The declaration alleged that the defendant kept a monkey which he knew to be dangerous and inclined to bite, and that it did attack and bite the plaintiff. Held, sufficient without alleging negligence in keeping it (*May v. Burdett*, 9 Q. B. 101). See *Scribner v. Kelley*, 38 Barb. 14; *Earl v. Van Alstine*, 8 Id. 630.

and are kept for convenience or use,⁴ such as dogs,⁵ cattle,⁶ horses,⁷ and even bees,⁸ is not liable for injuries willfully committed by them, unless he is proved to have had notice of the inclination of the particular animals complained of to commit such injuries.⁹ If, having had such notice, he neglects to keep them confined where no one can suffer from them while using ordinary care, he is liable for all injuries committed by them.¹⁰

⁴ This is the expression used in *Vrooman v. Lawyer* (13 Johns. 339), and cited with approval in *Earl v. Van Alstine* (8 Barb. 630, 636). In *Smith v. Causey* (22 Ala. 568), a very similar phrase is used.

⁵ *Fairchild v. Bentley*, 30 Barb. 147; *Steele v. Smith*, 3 E. D. Smith, 321; *Perkins v. Mossman*, 44 N. J. L. 579; *Thomas v. Morgan*, 2 Cr. M. & R. 496; *Woolf v. Chalker*, 31 Conn. 121; *Kinnion v. Davies*, Cro. Car. 487; see *Hinckley v. Emerson*, 4 Cow. 351; *Hartley v. Harriman*, 1 B. & Ald. 620; *Fleeming v. Orr*, 2 Macq. H. L. 14; *Card v. Case*, 5 C. B. 622. So as to cats (*McDonald v. Jodrey*, 8 Pa. Co. Ct. 142 [cat killed canary bird]).

⁶ *Van Leuven v. Lyke*, 1 N. Y. 515; *Vrooman v. Lawyer*, 13 Johns. 339; *Jackson v. Smithson*, 15 Mees. & W. 563; *Buxendin v. Sharp*, 2 Salk. 662.

⁷ *Cox v. Burbridge*, 13 C. B. N. S. 430.

⁸ *Earl v. Van Alstine*, 8 Barb. 630.

⁹ *Van Leuven v. Lyke*, 1 N. Y. 515; *Fairchild v. Bentley*, 30 Barb. 147; *Earl v. Van Alstine*, 8 Barb. 630; *Vrooman v. Lawyer*, 13 Johns. 339; *Cox v. Burbridge*, 13 C. B. N. S. 430; *Dufer v. Cully*, 3 Oreg. 377; *Wormley v. Gregg*, 35 Ill. 251; *Murray v. Young*, 12 Bush, 337; *Staetter v. McArthur*, 33 Mo. App. 218. One who, engaged to ride in a running race for horses, promoted by defendant, was injured by being thrown from her horse through defendant's

negligently permitting a vicious horse to run in the race, can recover (*Lane v. Minnesota Agric. Soc.*, 62 Minn. 175; 64 N. W. 382). Failure to inform a servant of the vicious kicking propensity of a horse furnished for his use by the master, with knowledge of such propensity, renders the master liable for injuries to the servant (*Helmke v. Stetler*, 69 Hun, 107; 23 N. Y. Supp. 392).

¹⁰ *Kelly v. Tilton*, 2 Abb. Ct. App. 495. So held in cases of injuries by dogs (*Wheeler v. Brant*, 23 Barb. 324; *Buckley v. Leonard*, 4 Denio, 500; *Loomis v. Terry*, 17 Wend. 496; *Read v. Edwards*, 17 C. B. N. S. 245; *Putnam v. Wigg*, 59 Hun, 627; 14 N. Y. Supp. 90; *Marsh v. Jones*, 21 Vt. 378; *Sherfey v. Bartley*, 4 Sneed, 58; *Durden v. Barnett*, 7 Ala. 196; *McCaskill v. Elliot*, 5 Strobb. 196; *McGuire v. Ringrose*, 41 La. Ann. 1029; 6 So. 895); cattle (*Stumps v. Kelley*, 22 Ill. 140; *Hudson v. Roberts*, 6 Exch. 697); a stallion (*Hammond v. Melton*, 42 Ill. App. 186); a ram (*Graham v. Payne*, 122 Ind. 403; 24 N. E. 216), and a buck-deer (*Congress Spring Co. v. Edgar*, 99 U. S. 645). In the last case, the action was for injuries from a buck in defendant's park, the declaration alleging that defendant knew the animal to be dangerous. There was evidence that the buck was allowed to roam in the park with several other deer; that plaintiff had often seen other persons playing with these deer in the park; that there had been

And the owner of even a wild beast is not liable for injuries caused by it in a manner which no acquaintance with its nature could have led him to expect, except upon similar evidence of notice.¹¹ The owner of any kind of animal, whether it be wild or tame, is chargeable with notice of its generic disposition to stray, and liability to take fright. If its size and speed are such as to make it dangerous, under such circumstances, the owner is bound to use ordinary care to keep it from straying; and if he neglects to do so, he will be liable for all injuries committed by it while straying, which he ought, in prudence, to have foreseen as likely to occur. For this reason, the owner of a horse is liable for damage done by it in running away, if he has not used due diligence to prevent its escape;¹² and this even though the immediate cause of the horse's running away was the wrongful act of a stranger.¹³ If, however, the owner of a tame and domestic animal has used ordinary care in its management, he is not liable for the injuries which it accidentally commits while in a place in which it may lawfully be.¹⁴

§ 630. What deemed sufficient notice.—It is not necessary that the owner of an animal should have any formal notice, or positive knowledge, of its vicious habits or disposition, in order to make him liable for its acts. It is sufficient if he has seen or heard of things which would suffice to convince a man of ordinary prudence that the animal was ill-disposed.¹

notices in the park for more than a year, "beware of the buck;" that plaintiff did not know deer to be dangerous unless disturbed. Experts testified that at the season when the injuries were suffered, deer were dangerous. Held, a nonsuit properly refused.

¹¹ So held, where plaintiff's horse was frightened by the mere sight of defendant's elephant (*Scribner v. Kelley*, 38 Barb. 14).

¹² *McCahill v. Kipp*, 2 E. D. Smith, 413; and cases cited under § 634, *post*.

¹³ If a horse and cart are left standing in the street of a city, without any person to watch them, the owner is liable for any damage done

by the horse in running away, though the act of a passer-by, in striking the horse, was the immediate cause of its starting (*Tindal, C. J., Illidge v. Goodwin*, 5 Carr. & P. 190; compare, however, *Hayman v. Hewitt*, Peake Add. Cas. 170). It is, of course, otherwise where the owner has kept due care of the horse (*Weldon v. Harlem R. Co.*, 5 Bosw. 576). Other similar cases are cited under § 645, *post*.

¹⁴ *Sullivan v. Scripture*, 3 Allen, 564; *Weldon v. Harlem R. Co.*, 5 Bosw. 576; compare *Sanders v. Teape*, 51 L. T. N. S. 263, (§ 626, *ante*). See further upon this subject, § 644, *post*.

¹ A jury may infer that defendant

But notice of the fact to a servant, in order to charge the master, must be communicated to the servant whose duty required him to inform his master, and whose admissions would be competent evidence against him.²

§ 631. What kind of notice necessary.—It is not necessary that the acts of aggression brought to the notice of the owner should be precisely similar to that upon which the action against him is founded.¹ But it is necessary that

knew what was common knowledge as to the vicious propensities of an animal (*Linnehan v. Sampson*, 126 Mass. 506). *s. p.*, *Young v. Murray*, 12 Bush, 337; *Meier v. Shrunk*, 79 Iowa, 17; 44 N. W. 209 [bull]; *Cameron v. Bryan*, 89 Iowa, 214; 56 N. W. 434 [dog]; *Fake v. Addicks*, 45 Minn. 37; 47 N. W. 450 [dog]; *Robinson v. Marino*, 3 Wash. St. 434; 28 Pac. 752 [dog]. In *Norris v. Warner* (59 Ill. App. 300), held error to admit proof of the general reputation of the dog for viciousness, and the manner in which the public acted towards him. For a case of insufficient proof of knowledge, see *Lawlor v. French*, 1 N. Y. App. Div. 634 *mem.*; 37 N. Y. Supp. 807.

² *Baldwin v. Casella*, L. R. 7 Exch. 325 [owner of dog appointed a servant to keep it]; *Applebee v. Percy*, L. R. 9 C. P. 647; *Jeffrey v. Bigelow*, 13 Wend. 518 [agent to sell sheep knew them to be diseased]. See also, *Kennett v. Durgin*, 59 N. H. 560; *Moulton v. Moore*, 56 Vt. 700. The knowledge of the wife is the knowledge of the husband (*Gladman v. Johnson*, 36 L. J. C. P. 153); but knowledge of husband will not be imputed to the wife so as to render her liable after his death (*Miller v. Kimbray*, 16 L. T. N. S. 360). In *Twigg v. Ryland* (62 Md. 380), held that a servant's knowledge of the vicious character of a dog accustomed to follow him about in the

master's business, but not put in his charge by the master, is not imputable in the latter. See *Stiles v. Cardiff Steam Nav. Co.*, 33 L. J. Q. B. 319; *Simpson v. Griggs*, 58 Hun, 393; 12 N. Y. Supp. 162. In *Brice v. Bauer* (108 N. Y. 428; 15 N. E. 695), a servant's knowledge of a dog's ferocious disposition was imputed to master. The fact that a stable-man had told the superior hostler that the horse was vicious was sufficient to put defendant on inquiry respecting its character, and, in the absence of inquiry, to charge it with notice of its viciousness (*McGarry v. N. Y. & Harlem R. Co.*, 60 N. Y. Superior, 367; 18 N. Y. Supp. 195 [inferior hostler bitten by horse]). A corporation whose foreman is aware that a dog owned by it has some months previously bitten a person, is liable to an employee who is also bitten (*Keenan v. Gutta Percha Manuf'g Co.*, 46 Hun, 544). See *Leigh v. Omaha R. Co.*, 36 Neb. 131; 54 N. W. 134 [horse-car driver kicked by vicious broncho]; *Donahue v. Enterprise R. Co.*, 32 S. C. 299; 11 S. E. 95.

¹ In *McCaskill v. Elliott* (5 Strobh. 196), evidence of the general ferocity of the dog's character was held sufficient. *s. p.*, *Lynch v. McNally*, 7 Daly, 126; 73 N. Y. 347; *Jacoby v. Ockerhausen*, 59 Hun, 619; 13 N. Y. Supp. 499. It is proper to refuse to charge that plaintiff, in order to recover, must satisfy the jury that the

the facts thus brought to his notice should indicate a disposition to commit injuries substantially like those which form the basis of the claim against the owner.² Thus, in an action founded upon injuries inflicted by a dog upon a man, proof of the owner's knowledge that the dog had worried sheep would not suffice;³ since thousands of curs, who would not dare to touch a man, delight in attacking sheep. It might even be doubted whether such evidence would suffice in an action upon injuries to oxen; though we should think that great ferocity in attacking sheep might imply a disposition to attack cattle. On the other hand, proof of a habit on the part of a dog to attack large cattle might well imply his disposition to injure smaller animals.⁴ It would, at any rate, throw upon his owner the burden of clearly proving that the dog was *not* in the habit of biting such animals. Knowledge that a bull is in the habit of running at anything red, is sufficient to make it negligent to drive him through public streets, at any rate so far as to make the owner liable to a person injured by the bull in pursuit of some red object.⁵

§ 632. Sufficient evidence of notice.—The nature of the proof of an animal's vicious inclinations, and of the owner's notice, must, of course, vary greatly, according to circum-

horse had, prior to the accident, done mischief similar in character to that complained of, and that defendant knew it (*McGarry v. N. Y. & Harlem R. Co.*, 60 N. Y. Superior, 367; 18 N. Y. Supp. 195).

² If the animal has been mischievous only under special circumstances, changing its disposition for the time, the owner is not bound to foresee that it may be mischievous under other circumstances not affecting its disposition (*Tupper v. Clark*, 43 Vt. 200). In an action for damages done to a horse by a bull, evidence of a previous attack by the bull upon a man was held competent, but not conclusive evidence. The court below having held it *conclusive*, the judgment was reversed (*Cockerham v. Nixon*, 11 Ired. Law, 269).

³ *Kightlinger v. Egan*, 75 Ill. 141; see 65 Id. 235; *Corliss v. Smith*, 53 Vt. 532.

⁴ In *Mason v. Keeling* (12 Modern, 332), Gould, J., intimated that knowledge of a dog's propensity to bite cows would not make the owner liable for his biting sheep. But such evidence has been held competent in later times (*Pickering v. Orange*, 1 Scamm. 338, 492).

⁵ *Hudson v. Roberts*, 6 Exch. 697. The requisite *scienter* does not necessarily depend upon knowledge of the owner of an animal liable to be vicious, that it has actually made an attack and inflicted an injury upon a person. It is sufficient that he is advised that it is ferocious and ugly, and that there is reasonable ground to apprehend that it will do

stances. In an action against the owner of a dog which has attacked the plaintiff's person, it has been held that proof of one or two previous instances¹ of the kind, or even of mere attempts to bite,² brought to the notice of the defendant,³ will suffice; and even the fact of the dog's being kept chained during the daytime is strong evidence that his owner knew him to be dangerous;⁴ though it would, of course, make a dif-

such an injury if permitted (*Rogers v. Rogers*, 43 Hun, 634, *mem.*; 4 N. Y. State, 373 [bull]).

¹ *Mann v. Weiland*, 81 Pa. St. 243.

A subsequent instance is, of course, immaterial (*Thomas v. Morgan*, 2 Cr. M. & R. 499. If defendant's admission that he knew the nature of the animal is relied upon, it must appear that such admission referred to a time prior to the injury complained of; and if this is left in doubt by plaintiff's own evidence, the question cannot be submitted to jury (*Cooke v. Waring*, 2 Hurlst. & C. 332). In *Kennon v. Gilmer* (131 U. S. 22; 9 S. Ct. 696; *aff'g* 5 Mont. 257; 5 Pac. 847 [action by stage-coach passenger], held not improper to admit evidence of the horse's misbehavior twenty months after the accident, in connection with evidence of his misbehavior before and at the time of the accident; it tending to show a vicious disposition and fixed habit, and to support the allegation that the horse was not safe and well broken. The length of time to which such evidence may extend is largely within the discretion of the trial court. *S. P., Simson v. London, etc. Omnibus Co.*, L. R. 8 C. P. 390. Evidence that after hearing of the conduct of the animal, defendant ordered it to be shot, is irrelevant and injurious (*Nulsen v. Priesmeyer*, 30 Mo. App. 126). But compare *Webber v. Hoag*, 55 Hun, 605; 8 N. Y. Supp. 76.

² *Worth v. Gilling*, L. R. 2 C. P. 1;

Kessler v. Lockwood, 62 Hun, 619; 16 N. Y. Supp. 677; *Knowles v. Mulder*, 74 Mich. 202; 41 N. W. 896.

³ In *Buckley v. Leonard* (4 Denio, 500), two instances were held sufficient, taken in connection with other circumstances. In *Smith v. Pelah* (2 Strange, 1264), one was held enough. In *Arnold v. Norton* (25 Conn. 92), the judge charged that full and satisfactory proof of a single instance in which the dog had previously bitten a human being, and of the defendant's knowledge thereof, was sufficient, but that the force of such testimony would depend much upon the surrounding circumstances. Held, a proper instruction. In *Kittredge v. Elliott* (16 N. H. 77), evidence of notice of one attack by a dog was held sufficient to charge the owner for all its subsequent acts. See also *Woolf v. Chalker*, 31 Conn. 121. In *Loomis v. Terry* (17 Wend. 496), one instance seems to have been regarded as sufficient; though that point is not discussed in the opinion of the court. In *Cockersham v. Nixon* (11 Ired. Law, 269), one attempt of a bull to gore was held sufficient for this purpose.

⁴ *Godeau v. Blood*, 52 Vt. 251; *Goode v. Martin*, 57 Md. 606; *Montgomery v. Koester*, 35 La. Ann. 1091; *Flansburg v. Basin*, 3 Ill. App. 531; *Buckley v. Leonard*, 4 Denio, 500; *Warner v. Chamberlain*, 7 Houst. 18; 30 Atl. 638; *Jones v. Perry*, 2 Esp. 482. In *Beck v. Dyson* (4 Camp. 198), Lord Ellenborough

ference if it appeared that the dog was so kept merely to keep him from straying or being stolen. But mere snappishness in a small dog ought not to be held sufficient warning to the owner of its liability to inflict injuries rarely committed by dogs of its size; and, where evidence of mere *attempts* to bite is relied upon, it must appear that on such occasions the dog had really tried to injure the person assaulted.⁵ In an action upon injuries committed by one dog upon another, fuller evidence should be required, since some allowance must be made for the nature of the animal and for the difficulty of knowing which is the real aggressor in a dog-fight; but a few instances of apparently unprovoked violence on the part of the defendant's dog are sufficient proof of his viciousness.⁶ And there

held such evidence insufficient. The form of the pleadings in the latter case does not appear; but it seems probable that the declaration alleged former attempts to bite, and not merely general fierceness. Under such a declaration, the evidence would not have been admissible. Proof that defendant had warned a person to beware of the dog lest he should be bitten is evidence to go to the jury on the allegation that the dog was accustomed to bite mankind (*Judge v. Cox*, 1 Stark. 325; *Thomas v. Morgan*, 2 Cr. M. & R. 496; *Charlwood v. Greig*, 3 C. & K. 46; *Rider v. White*, 65 N. Y. 54).

⁵ *Line v. Taylor*, 3 Fost. & F. 731. *Erle, C. J.*, there charged the jury: "It is not necessary to show that he [the dog] was used to *bite*, if he was used to *injure* people. But if he merely had a habit of bounding upon people in play, even although in so doing he might frighten timid persons, or cause some little annoyance, that would not sustain the action." The defendant had a verdict. The owner of a dog is not excused, however, by the fact that it was generally reputed to be of an inoffensive disposition, nor even by its being in fact generally peaceable

and inoffensive, if it nevertheless was accustomed, even on rare occasions, to do mischief of such kind as to manifest its disposition to commit the injuries complained of (*Buckley v. Leonard*, 4 Denio, 500; *Knickerbocker Ice Co. v. De Haas*, 37 Ill. App. 195 [horse]; *Linck v. Scheffel*, 32 Id. 17 [dog]; *Graham v. Payne*, 122 Ind. 403; 24 N. E. 216 [butting ram]). See *Genenz v. De Forest*, 49 Hun, 364; 2 N. Y. Supp. 152 [evidence insufficient].

⁶ In *Wheeler v. Brant* (23 Barb. 324), four such instances were held enough for this purpose. Evidence that the dog habitually assailed people on the street near defendant's premises before plaintiff was bitten; that he had attacked a driver on a wagon; that plaintiff's employer informed defendant of this habit of the dog; and that he was also informed that the dog had assailed another person, and torn his coat,—held sufficient to charge defendant with knowledge of the dog's viciousness (*Webber v. Hoag*, 55 Hun. 605; 8 N. Y. Supp. 76). *s. p.*, *Turner v. Craighead*, 83 Hun, 112; 31 N. Y. Supp. 369. The mere fact of knowing his dog's habit of chasing persons or horses on the road ad-

are cases in which, although the animal never actually committed an injury, so far as its owner knew, yet its nature and appearance must have convinced the owner that it would certainly be disposed to do harm. Proof of this kind would be as cogent as evidence of particular acts of the animal.⁷

§ 633. **Keeping infectiously diseased animals.** — It is not in itself an act of culpable negligence to keep animals having an infectious disease. The owner cannot be held responsible for the communication of the disease to other animals, without proof of some fault on his part, other than the mere keeping such animals on his premises; nor does the fact that his neighbor keeps, to his knowledge, healthy animals upon the adjoining lot, alter the case.¹ But the owner of diseased cattle is liable for the consequences of their trespassing upon the land of another and thereby infecting healthy animals belonging to the owner of the land; and this without proof of *scienter* on defendant's part;² and so he is, if he willfully or negligently allows them to intermingle with the cattle of another.³ In

joining his premises, will not render owner liable for injuries to a person caused by his horses becoming frightened at the dog, where he has no knowledge that injury has ever resulted from the dog's habits, or of any acts of the dog likely to result in injury, and where he exercises ordinary care to prevent injuries by the dog (*Shaw v. Craft*, 37 Fed. 317). But compare *Jones v. Carey*, 9 *Houst.* 214; 31 *Atl.* 976.

⁷ *Kolb v. Klages*, 27 *Ill. App.* 531. The owner of a horse, who has seen or heard enough to convince a man of ordinary prudence of its inclination to commit injuries of the class complained of by plaintiff, may be liable therefor, though he has no actual knowledge that it has injured others before in a similar way (*Reynolds v. Hussey*, 64 *N. H.* 64; 5 *Atl.* 458).

¹ *Fisher v. Clark*, 41 *Barb.* 329; see *Mills v. Harlem R. Co.*, 2 *Robertson*, 326; *aff'd* (see 41 *N. Y.* 619); *Claren-*

don Land Co. v. McClelland, 89 *Tex.* 483; 34 *S. W.* 98.

² *Anderson v. Buckton*, 1 *Strange*, 192; *Barnum v. Vandusen*, 16 *Conn.* 200; *Lee v. Burk*, 15 *Ill. App.* 651; *Herrick v. Gary*, 65 *Ill.* 101; *Sangamon, etc., Co. v. Young*, 77 *Ill.* 197. But compare *Cooke v. Waring*, 2 *Hurlst. & C.* 331; *Noyes v. Colby*, 30 *N. H.* 143.

³ *Earp v. Falkner*, 34 *L. T.* 284. In *Eaton v. Winnie* (20 *Mich.* 157), the occupier of land under a license from the owner pastured diseased sheep thereon. The owner of the land, relying upon the licensee's representations as to the absence from danger from contagion, subsequently pastured his own sheep on the land, and they became infected. Held, that the licensee was liable. *s. p.*, *Fultz v. Wycoff*, 25 *Ind.* 321 [inducing livery-stable keeper to receive a horse, on representations that it had recovered from a distemper]; *Hite v. Blanchford*, 45 *Ill.* 9; *Penton v.*

the absence of a statutory requirement to keep diseased cattle inclosed, the mere keeping of diseased animals on the defendant's uninclosed ground, to which other animals are in the habit of coming, and where it is no trespass for them to come, is not an act of negligence, if the owner of the healthy animals is duly warned of the danger.⁴ In the absence of any fraudu-

Murdock, 22 L. T. N. S. 371. As to measure of damages, see *Crain v. Petrie*, 6 Hill, 523. It is a question of fact whether the disease was communicated by defendant's cattle (*Davis v. Walker*, 60 Ill. 452). See *Newkirk v. Milk*, 62 Id. 172; *Smith v. Race*, 76 Id. 490.

⁴ *Walker v. Herron*, 22 Tex. 55. By the law of that state, all uninclosed lands are common to the public. In Vermont, the owner of sheep infected with hoof-ail, foot-rot, or scab, must keep them inclosed, and is liable for all damage caused to any person by their running at large (Gen. Stat. ch. 104, § 7). See *Mass. Stat. 1885, c. 148*. Illinois, Missouri, Kansas, Iowa and other western states have passed acts prohibiting the importation into those states of what are known as Texas, Mexican and Indian or Cherokee cattle, between the months of March and November, on the ground that such cattle are apt to have, at that time of the year, a contagious disease known as the "Texas fever," liable to be communicated to native cattle. The Supreme Court of the United States has held these statutes unconstitutional, as infringing the jurisdiction of congress to regulate interstate commerce (*Hannibal, etc. R. Co. v. Husen*, 95 U. S. 465; overruling *Yeazel v. Alexander*, 58 Ill. 254; *Wilson v. Kansas City, etc., R. Co.*, 60 Mo. 184). But it is held that, irrespective of such a state statute, one who, knowing that his cattle are infected with a contagious disease,

brings his cattle into a state, and allows them to run at large on the range used by the cattle of another, whereby the other's cattle become infected and die, is liable to such other for the damage thus caused by his negligence (*Kemish v. Ball*, 30 Fed. 759). See *Woodrum v. Clay*, 33 Fed. 897; *Clarendon Land Co. v. McClelland*, 89 Tex. 483; 34 S. W. 98. The fact that plaintiff did not use all the precautions possible to prevent the infection of his cattle by defendants' cattle, which had come from the fever district of Texas, did not necessarily show contributory negligence, it not being customary to fence the range in the vicinity, and it not appearing, at the time of the mingling of the cattle that defendants' cattle had the fever (*Grayson v. Lynch*, 163 U. S. 468; 16 S. Ct. 1064). See s. c. below, *sub nom. Lynch v. Grayson*, 5 N. Mex. 487; 25 Pac. 992. A railway company which negligently allows Texas cattle to escape from its cars, and run at large, thereby affecting native cattle with Texas fever, is liable for the resulting loss (*Grimes v. Eddy*, 126 Mo. 168; 28 S. W. 756; s. c., 27 Id. 479; *Missouri Pac. R. Co. v. Finley*, 38 Kans. 550; 16 Pac. 951). Notice to train-men that cattle shipped on the train are diseased is notice to the corporation. (*Ib.*) The burden is on plaintiff to show that company had notice that the cattle were infected (*St. Louis, etc., R. Co. v. Goolsby*, 58 Ark. 401; 24 S. W. 1071). Company's liability limited to disease

lent concealment or misrepresentation on the owner's part, it has been held not unlawful to sell diseased cattle, though the seller knew them to be infected; and the seller is not liable for injuries occasioned by the disease spreading among the buyer's cattle: the rule of *caveat emptor* applies.⁵

§ 634. **Animals running at large.** — At common law, it was not unlawful for an owner of domestic animals, such as horses, cows, etc., to permit them to be at large on the highway unattended; and the owner was liable only for such damages as in the ordinary sequence of events might be expected to occur therefrom.¹ In many of the states, however, the common-law rule has been so far modified as to make the owner of certain animals, straying without a keeper on a highway, liable for injuries committed by them, without proof of knowledge on his part of their propensities.² A breach of a

communicated in the neighborhood or along its railroad line (*Coyle v. Chicago, etc., R. Co.*, 27 Mo. App. 584). See *Coyle v. Conway*, 35 Mo. App. 490. Under the Iowa statute, the company's liability is not absolute, but only *prima facie*, which may be rebutted by showing freedom from negligence on its part (*Furley v. Chicago, etc. R. Co.*, 90 Iowa, 146; 57 N. W. 719).

⁵ *Hill v. Balls*, 2 Hurlst. & N. 299. Otherwise, of course, if there was fraud (*Mullett v. Mason*, L. R. 1 C. P. 539). See *Jeffrey v. Bigelow*, 13 Wend. 518. Under a statute making it a misdemeanor to sell domestic animals knowing them to be infected with "contagious or infectious" disease, etc., the fact that hogs sold had an infectious disease is a good defense to an action for the purchase price (*Stryker v. Crane*, 33 Neb. 690; 50 N. W. 1132).

¹ In England, no one but the owners of the fee in the highway, or the public, can complain of the presence of the animal (*Cox v. Burbridge*, 13 C. B. N. S. 430; *Jackson v. Smithson*, 15 Mees. & W. 563). See cases

cited in note 7, § 365, *ante*. A dog that persistently assails people passing along a public road in a threatening manner is a nuisance, and may be killed by any person so assailed (*Nehr v. State*, 35 Neb. 638; 53 N. W. 589).

² So held in *Maine* (*Decker v. Gammon*, 44 Me. 322); *Connecticut* (*Baldwin v. Ensign*, 49 Conn. 113); *Massachusetts* (*Barnes v. Chapin*, 4 Allen, 444 [horse turned loose on a highway kicked a colt lawfully there]); *Rhode Island* (Gen. Stat. ch. 96; see *Fallon v. O'Brien*, 12 R. I. 518); *Vermont* (*Holden v. Shattuck*, 34 Vt. 336; *Russell v. Cone*, 46 Id. 600; *Town v. Lampshire*, 37 Id. 52 [owner of ram, at large between Aug. 1 and Dec. 1, unconditionally liable]); *New York* (Laws of 1869, ch. 424; *Bowyer v. Burlew*, 3 Thomp. & C. 362 [horses at large injured a traveler]). An animal escaped from its owner's premises without fault, and to recover which he has made immediate and suitable efforts, is not running at large within the statute (*Coles v. Burns*, 21 Hun, 246). So in *Pennsylvania* (*Goodman v. Gay*, 15 Pa. St. 188

positive duty thus imposed, to keep the animals from running at large in the highway, of itself constitutes actionable negligence.³ The owner is nowhere held liable for injuries inflicted by a domestic animal, such as a horse, while running away from him upon the highway, if the animal was traveling under his charge, in a proper manner, and he used ordinary care to prevent such escape.⁴ But if a horse of ever so peaceful a disposition is left by the owner upon the highway unattended and unfastened, a jury may hold him liable for injuries committed by it in running away, or otherwise acting according to its well-known nature,⁵ even though provoked thereto by a stranger.⁶ So long, however, as it does not run away, the question of negligence in leaving it unattended is for the jury, who may consider the temper, habits, and training of the animal. This is especially the case where the circumstance is relied upon merely in support of a defense of contributory negligence.⁷ We have elsewhere stated the rule that, even

[horse kicked a child]; *Ohio* (see *Marietta, etc., R. Co. v. Stephenson*, 24 *Ohio St.* 48); *Indiana* (*Eichel v. Senhenn*, 2 *Ind. App.* 208; 28 *N. E.* 193); *Michigan* (*Shipley v. Colclough*, 81 *Mich.* 624; 45 *N. W.* 1106); *Wisconsin* (*Rev Stat. ch. 51*; *Pettit v. May*, 34 *Wisc.* 666); *Iowa* (*Meier v. Shrunk*, 79 *Iowa*, 17; 44 *N. W.* 209; see *Crawford v. William*, 48 *Iowa*, 247); *Nebraska* (*Glidden v. Moore*, 14 *Neb.* 84; 15 *N. W.* 326).

³ *Bowyer v. Burlew*, 3 *Thomp. & C.* 362. As to the law of *Indiana*, see *Klenberg v. Russell*, 125 *Ind.* 531; 25 *N. E.* 596.

⁴ *Sullivan v. Scripture*, 3 *Allen*, 564; *Goodman v. Taylor*, 5 *Carr. & P.* 410; see *Goodman v. Gay*, 15 *Pa. St.* 188, 194; *Weldon v. Harlem R. Co.*, 5 *Bosw.* 576. In *California*, it is held that persons driving cattle through the streets of a city are liable for any injury resulting from the want of the *utmost* care (*Ficken v. Jones*, 28 *Cal.* 618). Leading two skittish horses by one halter only, held negligence (*Pickens v. Diecker*,

21 *Ohio St.* 212). So is driving a steer by one on horse-back; steer running on sidewalk very fast (*Eichel v. Senhenn*, 2 *Ind. App.* 208; 28 *N. E.* 193). See *Grinnell v. Taylor*, 85 *Hun.* 85; 32 *N. Y. Supp.* 684 [led horse in roadway swerved to sidewalk and kicked passer by; negligence for the jury]; *Crozier v. Read*, 78 *Hun.* 181; 28 *N. Y. Supp.* 914; *Barnum v. Terpenning*, 75 *Mich.* 557; 42 *N. W.* 967 [driving bull, in stead of leading him by ring in nose].

⁵ *Dickson v. McCoy*, 39 *N. Y.* 400 [defendant permitted his horse to go loose upon sidewalk of city street]. For cases of liability for injuries done by horses carelessly left standing in highway, either not hitched or carelessly hitched, see § 645, note 7, *post*.

⁶ *Illidge v. Goodman*, 5 *Carr. & P.* 190; see *McCahill v. Kipp*, 2 *E. D. Smith*, 413; *Lyons v. Merrick*, 105 *Mass.* 76. It is a question for the jury (*Griggs v. Fleckenstein*, 14 *Minn.* 81).

⁷ *Park v. O'Brien*, 23 *Conn.* 339;

where cattle are allowed by law to stray at large, their owner is bound to use ordinary care and diligence to prevent their straying upon land properly enclosed; and, if he allows them to wander unattended upon a railroad that is sufficiently fenced, he is liable to the company for the resulting damage.⁸

§ 635. Who will be deemed the owner of animal. — The owner of an animal, within the meaning of the rule of liability above stated is the person who has the control of it, or whose duty it is to have such control.¹ Presumptively, of course, the lawful owner has this control, or duty of control; but if it appears that he has not in fact, he is not responsible for the animal.² Thus, if a horse of vicious habits should be stolen, or even wrongfully taken under a claim of title, the person thus taking it, and not the real owner, would be liable to third persons as its owner while it remained in his possession. So, if an animal is hired out, and even, we think, if it is simply lent, for such a time and in such a manner as to give the hirer or borrower exclusive control over it, he, and not the ultimate owner, is liable in like manner.³ Of course, a mere servant is not liable for the acts of his master's animals. But, with these exceptions, it appears to be the settled rule that a person

Albert v. Bleecker St. R. Co., 2 Daly, 389; see *Walton v. Brighton, etc.*, R. Co., 1 Harr. & R. 424; *Matson v. Maupin*, 75 Ala. 312.

⁸ *Sinram v. Pittsburgh, etc. R. Co.*, 28 Ind. 244; and cases cited under § 456, *ante*.

¹ Joint owners are liable: the custody of one being, as to third persons, the custody of both (*Smith v. Jaques*, 6 Conn. 530; *Oakes v. Spaulding*, 40 Vt. 347.) S. P., *Lettes v. Horning*, 67 Hun, 627; 22 N. Y. Supp. 565. But for a construction of the dog-statute of Massachusetts on this point, see *Buddington v. Shearer*, 20 Pick. 477; 22 Id. 427. Under the Maine statute, one member of a firm may be sued as the keeper of a dog owned and kept by the firm (*Grant v. Ricker*, 74 Me. 487).

² The lessor of a farm on shares is

not responsible for the trespass of a vicious ram left by him on the farm, on surrendering the management to lessee (*Marsh v. Hand*, 120 N. Y. 315; 24 N. E. 463). S. P., *Simpson v. Griggs*, 58 Hun, 393; 12 N. Y. Supp. 162 [farmhand's dog]. See *Whittemore v. Thomas*, 153 Mass. 347; 26 N. E. 875.

³ In *Thorp v. Minor* (109 N. C. 152; 13 S. E. 702), defendant left his horse with his lessee, with whom he used the horse in common. The lessee lent the horse to a third person without the knowledge of the owner, to drive to a picnic, telling him to send the horse back if he had opportunity, which he did by a minor. The minor left the horse standing in the street, and it ran away, and killed plaintiff's horse. Held, defendant not liable.

injured by an animal may hold either the actual owner or the person having it in charge liable for the injury, if it is one for which he ought to recover at all.⁴ Therefore, one who harbors a dangerous animal on his premises, though not its owner in any sense, is nevertheless responsible for injuries committed by it, while on or near his premises, to the same extent as if he owned it.⁵ But one who has vainly tried to drive off a

⁴ *Wilkinson v. Parrott*, 32 Cal. 102. A father borrowed a dog from his son without (as he testified) any intention of returning him, having previously transferred the dog to his son upon a secret trust to defraud his creditors. Held, that the son was nevertheless liable for injuries done by the dog while at the father's house (*Marsh v. Jones*, 21 Vt. 378). A mere agistor of animals is liable for their trespasses (*Sheridan v. Bean*, 8 Metc. 284; *Lyons v. Merrick*, 105 Mass. 71; *Tewksbury v. Bucklin*, 7 N. H. 518; *Barnum v. Vanduson*, 16 Conn. 200; *Ward v. Brown*, 64 Ill. 307; *Osborn v. Adams*, 70 Id. 291; *Cook v. Morea*, 33 Ind. 497). See *Smith v. Race*, 76 Ill. 490. The fact that, at the time when a vicious horse kicked a colt, the owners' servant had, without their knowledge or consent, temporarily placed the horse in charge of another person, does not relieve the owner from liability (*Campbell v. Trimble*, 75 Tex. 270; 12 S. W. 863). Plaintiff's employer had taken defendant's farm to work on shares, the contract providing that defendant should leave a bull on the farm. The bull becoming dangerous, defendant was notified, but refused to have the animal shut up, and declined to take care of it. Held, that he was liable as owner of the bull (*Lettis v. Horning*, 67 Hun, 627; 22 N. Y. Supp. 565). It was said in that case, that if defendant and plaintiff's employer could, on the

evidence, be regarded as tenants-in-common of the animal, the former was also liable. See *Sheldon v. Skinner*, 4 Wend. 525.

⁵ *McKone v. Wood*, 5 Carr. & P. 1; *Frammell v. Little*, 16 Ind. 251; *Barrett v. Malden, etc. R. Co.*, 3 Allen, 101 [dog kept by servant, with knowledge of master]; *Cummings v. Riley*, 52 N. H. 368 [boarding-house keeper permitted boarder to keep a dog]; *Jones v. Carey*, 9 Houst. 214; 31 Atl. 976. Compare *Auchmuty v. Ham*, 1 Denio, 495. Defendant, an inn-keeper, hitched plaintiff's horse, which was in his care, next a horse known to be in the habit of kicking, and plaintiff's horse was kicked by it. Held, defendant was liable (*Clary v. Wiley*, 49 Vt. 55). Harboring of dog, known to be vicious, liable, regardless of ownership (*Hornbein v. Blanchard*, 4 Colo. App. 92; 35 Pac. 187; *Harris v. Fisher*, 115 N. C. 318; 20 S. E. 461). In New York, it is held that a wife is liable for harboring a dog belonging to her husband, on premises owned by her, and known by her to be vicious; and that [under married woman's act of 1862] the husband could not be sued jointly with her for an injury done by the dog, the husband not being liable for the wife's trespasses in the management of her separate estate (*Quilty v. Battie*, 135 N. Y. 201; 32 N. E. 47). This case was distinguished in *Bundschuh v. Mayer* (81 Hun, 111; 30 N. Y. Supp. 622)—separate action

strange animal from his premises is not liable for its acts.⁶ And a lessor of premises where a dog is kept by the lessee is not a harbinger of the dog, under the statute or otherwise,⁷ unless he is shown to have some interest in the dog or right of direction and control.⁸

§ 636. Ownership, how proved.—The ownership of an animal is sufficiently established by evidence that it was in the possession of the person sought to be charged with liability for its acts.¹ He may, of course, show upon his part that, notwithstanding such possession, he was not the actual owner of the animal; but the burden of proof in that respect is upon him; and in the absence of such proof, the fact of his possession is enough, not merely to authorize, but to require a jury to find that he was the owner.² Of course, it must be understood that in some cases the circumstances of possession, as proved by the plaintiff himself, will show that the defendant was not the owner. The evidence of possession to which we refer as implying ownership is such as shows either a mere naked possession, without anything to show that the defendant

against the husband—in which it was held that, as the husband, in fact, kept and harbored the dogs which did the injury, it was immaterial that the premises belonged to his wife or to anyone else. “The cardinal facts which determine his liability are that he was the head of the household; that, as such, he occupied the premises; that he supported his family and with them the dogs which were kept on the place” (Dwight, P. J.). See *Kessler v. Lockwood*, 62 Hun, 619; 16 N. Y. Supp. 677.

⁶ A strange dog hung about a railroad station, and attacked a lady. Complaint was made to the company's servants, who promised to drive it off, but could not find it. Afterward finding it in the signal box, the man kicked it out, and it ran off to the platform and bit a

passenger. Held, company was not liable (*Smith v. Great Eastern R. Co.*, L. R. 2 C. P. 4).

⁷ *Jennings v. Burton Co.*, 73 Hun, 545; 26 N. Y. Supp. 151.

⁸ *Garrison v. Barnes*, 42 Ill. App. 21.

¹ *Fish v. Skut*, 21 Barb. 333. See *Marsh v. Hand*, 40 Hun, 339; *Jones v. State*, 3 Tex. App. 498.

² *Fish v. Skut*, 21 Barb. 333. For the purpose of identifying dogs charged with sheep-killing at night, it is proper to show that two dogs had been seen in company on another occasion, one of whom was known to have taken part in the sheep-killing, as a basis for a presumption that they were together in the killing (*Carroll v. Weiler*, 1 Hun, 605). A witness may testify that he recognized the dog by his bark (*Wilbur v. Hubbard*, 35 Barb. 303).

was not the owner, or a possession accompanied with circumstances further indicative of ownership.³

§ 637. Imputed knowledge of animal's habits. — It is a nice question to determine how far the notice which the legal owner of an animal has of its habits is to be imputed to other persons having it in their charge, and standing in the position of the owner in respect to third persons. Against one who wrongfully takes an animal the case is clear.¹ Guilty of more than negligence toward the lawful owner, he is, as to third persons, guilty of gross negligence in assuming the charge of an animal with the nature of which he is unacquainted. It is the duty of the owner to communicate his knowledge upon this point to any person hiring or borrowing the animal;² and the latter has, therefore, a remedy over, which affords some

³ In New York, it is provided by statute that every person in possession of a dog, or who suffers a dog to remain about his house for the space of twenty days previous to any attack made by such dog upon sheep, is to be deemed the owner of such dog, so far as to make him liable for the killing and wounding of such sheep (1 N. Y. Rev. Stat. 708, § 20; see *Auchmuty v. Ham*, 1 Denio, 495). A person who knowingly permits his servant to keep a dog on his premises is a "keeper" of the dog, under the Missouri statute (Rev. St. 1889, § 4512), which makes the "owner or keeper" of a dog liable for damages by such dog to sheep or other domestic animals (*Jacobs-meyer v. Poggemoeller*, 47 Mo. App. 560.)

¹ *Burnham v. Strother*, 66 Mich. 519; 33 N. W. 410.

² *Campbell v. Page*, 67 Barb. 113. A lender is bound to inform the borrower of any defect in the thing lent, of which he is aware, and which renders it dangerous to the borrower (*Story, Bailm.*, § 275; see *Blakemore v. Bristol*, etc. R. Co., 8 El. & Bl. 1035, 1051). The obligation

of a mere lender goes no further than this. He cannot be made liable for not communicating anything which he did not *in fact* know, whether he *ought* to have known it or not (see *McCarthy v. Young*, 6 Hurlst. & N. 329). One who lets a chattel upon hire is under greater obligations in this respect than a mere lender. According to the civil law, he warrants the thing hired to be fit for the use contemplated by the parties (*Story, Bailm.*, §§ 383, 390, 391a). Certainly he warrants it against vices of which he *ought* to be aware; and these include all those for which the hirer of an animal could be made liable (see *Kershan v. Gates*, 2 Thomp. & C. 288 [the vice must be *dangerous*]); but not against defects which he does not know of, and could not have discovered by the exercise of due care (*Copeland v. Draper*, 157 Mass. 558; 32 N. E. 944). See *Horne v. Meakin*, 115 Mass. 326 [defendant liable for letting horse known to have run away several times before, and which ran away with plaintiff]; *Cullen v. Lord*, 39 Iowa, 303; *Marsel v. Bowman*, 62 Id. 57; 17 N. W. 176.

grounds for holding him responsible for the possession of the information to which he has thus a right: while it would be difficult, if not impossible, to maintain that third persons could sue the owner for his omission of a duty which he owed to the hirer of the animal, and not to them. A distinction must, however, be made between the various classes of bailees. While all should be held liable to third persons, to the extent of the notice which they respectively have of the habits of animals under their control, for their negligence in controlling such animals; yet the extent to which notice will be implied as well as the extent of control which the bailee may exercise, varies in different cases; and the obligations of the bailee vary accordingly. A borrower can at most be charged with notice of facts actually known to the lender, those being all that the latter is bound to communicate; while hirers, pawnees, or depositaries, being entitled to information of everything indicating vicious habits, of which the bailor had *notice*, may be held chargeable with the like notice, since they can recover against the bailor for his failure to communicate it to them.

§ 638. Separate owners; when jointly liable. — Where two or more animals, belonging to different persons, unite in committing an injury, the owners cannot at common law be made jointly liable for the acts of all the animals thus acting together;¹ but each owner is separately liable for so much only of the damage as was done by his animal.² It is true that it may often be impossible to tell precisely how much of the whole damage was done by each animal; but the jury are at liberty to adopt any reasonable method of assessing the damages for this purpose. Where the animals are about equal in capacity for mischief, the jury may properly assume, in the absence of proof, that each animal did an equal proportion of the damage;³ and when they are not of equal size, the jury

¹ Van Steenburgh v. Tobias, 17 Denio, 495; and cases *supra*. The Wend. 562; Russell, v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Vt. 9; Buddington v. Shearer, 20 Pick. 477; ²Partenheimer v. Van Order, *supra*; Buddington v. Shearer, 20 Pick. 477. The text sustained; Carroll v. Weiler, 1 Hun, 605.

³Partenheimer v. Van Order, 20 Barb. 479; Auchmuty v. Ham, 1 Powers v. Kindt, 13 Kans. 74.

may assume that the smaller animal committed less injury than the other.⁴ In Vermont, Connecticut, Ohio, Indiana and other states, by statute, the several owners of dogs which unite in doing injury are jointly liable therefor. And it is so held in Pennsylvania, under a different statute.⁵

§ 639. **Contributory negligence.** — Where a vicious animal is properly confined, one who, having knowledge of his habits, goes within its reach, takes the risk on himself.¹ One who will wantonly irritate an animal may justly be left to bear his fate; but the owner of a ferocious dog ought not to leave him with impunity in places exposed to the careless tread of passers-by; the doctrine of contributory negligence does not apply in such a case.² It is not negligence to irritate an animal when neces-

⁴ *Wilbur v. Hubbard*, 35 Barb. 303.

⁵ *Kerr v. O'Connor*, 63 Pa. St. 341.

¹ *Buckley v. Gee*, 55 Ill. App. 388; *Farley v. Picard*, 78 Hun, 560; 29 N. Y. Supp. 802. Plaintiff, who knew a horse to be vicious, but supposed it to be muzzled, as it usually was, held, not in fault for passing so near as to enable it bite him (*Koney v. Ward*, 2 Daly, 295). No defense that plaintiff knew dog's habit of attacking teams passing defendant's premises, and was not cautious in driving by when attacked (*Jones v. Carey*, 9 Houst. 214; 31 Atl. 976). To same effect, *Dockerty v. Hutson*, 125 Ind. 102; 25 N. E. 144. Driven horse on highway being bitten by defendant's dog, driver struck horse while backing, and was thrown out by sudden start of horse. His contributory negligence properly submitted to jury (*Putnam v. Wigg*, 59 Hun, 627; 14 N. Y. Supp. 90). The fact that plaintiff put his hand on the neck of a dog in his custody, to fetch him along and prevent a fight with defendant's dog, lying under a wagon, four or five feet away, does not, as a matter of law, show a failure on plaintiff's part to exercise due care, which will prevent his recover-

ing for a bite, inflicted by defendant's dog, which immediately thereafter sprang on plaintiff's dog, and in so doing struck plaintiff's finger (*Matteson v. Strong*, 159 Mass. 497; 34 N. E. 1077). One standing on a bridge is not in fault in not leaving the bridge on seeing a bull coming on, so as to bar recovery for the animal's attack (*Barnum v. Terpenning*, 75 Mich. 557; 42 N. W. 967). Plaintiff, while riding in a buggy drawn by one horse, overtook and, on attempting to pass a cow (driven by two boys), the cow and the buggy came into collision, and plaintiff was injured. Held, error to refuse to nonsuit (*Smith v. Matteson*, 41 Hun, 216).

² *Fake v. Addicks*, 45 Minn. 37; 47 N. W. 450; *Woolf v. Chalker*, 31 Conn. 121; and see *Smith v. Pelah*, 2 Strange, 1264. Plaintiff, while passing defendant's store, offered the latter's dog, which was lying in front, unfastened, a piece of candy, when the dog sprang at and bit her. Defendant endeavored to show the contributory negligence of plaintiff in attempting familiarity with the dog, but the court held that the rule of contributory negligence did not apply to accidents of

sary to prevent it from doing mischief; and one who sustains an injury in so doing may nevertheless recover from its owner therefor.³ A merely technical trespass by the plaintiff at the time is no defense to an action for an injury received from a vicious dog;⁴ but where a dog is confined in a yard for the protection of the house, no one injured by it can recover damages, unless he had a right to be there.⁵ It is not necessarily culpable negligence in a child to play with a strange dog, nor for the child's parent to suffer it to do so. The question is for the jury.⁶ But it would be such negligence to suffer a child to approach a ferocious dog chained up in a retired

this description, because the act of keeping a vicious animal is wrong absolutely (*Lynch v. McNally*, 73 N. Y. 347). In *Muller v. McKesson* (Id. 195), held, that plaintiff's conduct toward the animal, to constitute a defense, must be such as would establish that, with knowledge of the animal's character, he voluntarily brought the injury on himself (see *Barlow v. McDonald*, 39 Hun, 407). As to contributory negligence of children, see *Meibus v. Dodge*, 38 Wisc. 300; *Plumley v. Birge*, 124 Mass. 57; *Linnehan v. Sampson*, 126 Id. 506. But one who kicks or annoys a dog, which turns and bites him, cannot recover from the owner (*Keightlinger v. Egan*, 65 Ill. 235). *s. p.*, *Williams v. Moray*, 74 Ind. 25. But compare *Linck v. Scheffel*, 32 Ill. App. 17 [boy of seven kicked dog, which bit him].

³*Blackman v. Simmons*, 3 Carr. & P. 138. In that case, defendant's bull pursued plaintiff's cow, and plaintiff drove it off; whereupon the bull turned upon him. Held, plaintiff not in fault. Whether plaintiff was guilty of contributory negligence in striking the bull before it attacked him, is for jury (*Meier v. Shrunk*, 79 Iowa, 17; 44 N. W. 209). Plaintiff shook his coat to turn animal away; question, whether he could have avoided animal, for jury

(*Eichel v. Senhenn*, 2 Ind. App. 208; 28 N. E. 193).

⁴*Loomis v. Terry*, 17 Wend. 496; *Kelly v. Tilton*, 3 Keyes, 263; *Rider v. White*, 65 N. Y. 54; *Hubert v. Bedell*, 66 Hun, 631, *mem.*; 21 N. Y. Supp. 305; *Sherfey v. Bartley*, 4 Sneed, 58; *Marble v. Ross*, 124 Mass. 44; *Woolf v. Chalker*, 31 Conn. 121; *Sylvester v. Maag*, 155 Pa. St. 225; 26 Atl. 392; *Graham v. Payne*, 122 Ind. 403; 24 N. E. 216; *Conway v. Grant*, 88 Ga. 40; 13 S. E. 803; *Melheimer v. Sullivan*, 1 Colo. App. 22; 27 Pac. 17.

⁵*Sarch v. Blackburn*, 4 Carr. & P. 297. This is especially the case at night, for it is then peculiarly proper to turn a dog loose for the protection of the house (*Brock v. Copeland*, 1 Esp. 203). Plaintiff is bound to show, in action under statute, that he was not "doing an unlawful act" (*Stuber v. Gannon*, Iowa, ; 67 N. W. 105).

⁶*Munn v. Reed*, 4 Allen, 431. The child in that case was four years old, and irritated the dog while playing with it in the presence of his mother. It was held that he could recover for the bite of the dog, the question of contributory negligence having been left to the jury; and he had a verdict. *s. p.*, *Plumley v. Birge*, 124 Mass. 57; *Meibus v. Dodge*, 38 Wisc. 300. Not

place.⁷ The fact that the plaintiff had been warned against going near a dog fastened up, is not conclusive evidence of negligence on the part of the plaintiff, though he did go near him.⁸ When a horse is left unattended in a public road, the jury should consider whether that circumstance contributed to an injury suffered by it at that time, whether by collision or otherwise.⁹ So under the Massachusetts statute, where the act of a dog was the sole and proximate cause of a horse shying, and such shying was not the result of any vicious habit of the horse, the fact that such shying contributed to plaintiff's injury does not prevent him from maintaining an action against the owner of the dog.¹⁰

§ 640. Driving animals off land.—The owner or occupant of land has a right to drive off animals trespassing on it, and to use any ordinary and reasonable means for this purpose. He may drive such animals into the highway, and leave them to their fate, for which he is not responsible;¹ but if he drives them any further along the highway than is necessary to keep them off his land, he is liable for any injury thereby caused to their owner, such as their loss by straying.² Under some circumstances he is justified in shooting a trespassing animal, *e. g.*, a thieving dog, — for the protection of his property.³ The occu-

competent to show that at other times the boy had teased and worried the dog (*Linck v. Scheffel*, 32 Ill. App. 17).

⁷ See *Logue v. Link*, 4 E. D. Smith, 63.

⁸ *Curtis v. Mills*, 5 Carr. & P. 489. There, defendant led the way past his dog; and plaintiff, following in his steps, was seized by it.

⁹ *Walton v. Brighton, etc. R. Co.*, 1 Harr. & R. 424; *Park v. O'Brien*, 23 Conn. 339. A. let his mare graze in the same field with B.'s bull. The bull gored the mare; held, that A. had no cause of action against B. (*Carpenter v. Latta*, 29 Kans. 591). Plaintiff's horses escaped from the control of their keeper by his negligence, and got upon defendant's premises, where they were chased by defendant's dogs, and injured by

running against wire fence. Held, plaintiff was guilty of contributory negligence (*Cook v. Pickrel*, 20 Neb. 433; 30 N. W. 421).

¹⁰ *Denison v. Lincoln*, 131 Mass. 236. See also, *Mareau v. Vanatta*, 88 Ill. 132.

¹ *Humphrey v. Douglass*, 10 Vt. 71; see *Knour v. Wagoner*, 16 Ind. 414; *Avery v. People*, 11 Ill. App. 332; *Spray v. Ammerman*, 66 Ill. 309.

² *Knour v. Wagoner*, 16 Ind. 414.

³ *Dunning v. Bird*, 24 Ill. App. 270 [dog found coming out of meat-house at night; owner not known]. Statutes exist in every state declaring the liability of the owner of dogs discovered killing, wounding or chasing sheep, and in Illinois any one may kill such a dog (see *Brent v. Kimball*, 60 Ill. 211; *Spray v. Ammerman*, 66 Id. 309). In *Lipe v.*

pant has a right to drive off, in a similar manner, animals which are not trespassers, as where they come on his land through defects of fences which it was his duty to maintain;⁴ but in such case, if the animals are owned by an adjoining proprietor, to whom he owes this duty, he must drive them upon their owner's premises, and not upon the highway, under pain of liability for their loss.⁵ The occupant of land may set a dog to drive off trespassing cattle,⁶ if it is one of a kind that is not likely to wound or otherwise injure them without necessity.⁷ But in so doing he must use ordinary care, restraining his dog from excessive worrying and positive violence.⁸ If he uses his best efforts for this purpose, and the dog is not one which he has reason to believe to be needlessly fierce, he is not liable to an action for some excess of zeal on the part of the dog.⁹

Blackwelder (25 Ill. App. 119), held proper to charge that if, in shooting and wounding with bird-shot, one of a number of dogs while hunting in defendant's wheat field, and which were in the habit of hunting therein, and had already destroyed a quantity of wheat, defendant used such means as a reasonable man would use to exclude the dogs therefrom, and did no more harm to the dog than was necessary, the jury should find for defendant. But an owner of crops has no right to kill turkeys trespassing upon his premises (Reis v. Stratton, 23 Ill. App. 314). Rhode Island has a sensible statute (Pub. St. c. 93, § 6), that "any person may kill any dog that may suddenly assault him, or any person of his family, or in his company, while the person so assaulted is out of the inclosure of the owner or keeper of such dog." See Spaight v. McGovern, 16 R. I. 658; 19 Atl. 246.

⁴ Clark v. Adams, 18 Vt., 425; see Knour v. Wagoner, 16 Ind. 414; Lord v. Wormwood, 29 Me. 282; compare Perkins v. Perkins, 44 Barb. 134; Humphrey v. Douglass, 11 Vt. 23; McIntire v. Plaisted, 57 N. H. 606; Totten v. Cole, 33 Mo. 138.

⁵ Knour v. Wagoner, 16 Ind. 414.

⁶ Davis v. Campbell, 23 Vt. 236; Clark v. Adams, 18 Id. 425; Wood v. La Rue, 9 Mich. 158; Smith v. Walldorf, 13 Hun, 127.

⁷ See Clark v. Adams, 18 Vt. 425; Wood v. La Rue, 9 Mich. 158. One who chases an animal, such as a horse, out of his field, with a very large and fierce dog, is liable for injuries thus inflicted (Amick v. O'Hara, 6 Blackf. 258). One who willfully sets dogs on trespassing animals [colts], without taking any precautions to prevent their injury, is liable for the consequences of their being driven against a barbed-wire fence (Aspegren v. Kotas, 91 Iowa, 497; 59 N. W. 273).

⁸ Cases, *supra*; also, Deane v. Clayton, 7 Taunt. 496; Snap v. People, 19 Ill. 80.

⁹ Thus, where a man chased strange sheep off his land by the help of his dog, doing all in his power to call back the dog as soon as the sheep were off his ground, he was held not liable, although his dog actually chased the sheep for some distance further; the court saying that the nature of a dog was such that he could not instantly be recalled (Mil-

§ 641. **Negligence in impounding cattle.**—One who impounds animals straying upon his land is bound to put them in a pound fit at that time for the purpose, and cannot relieve himself from liability for injuries suffered by cattle, from the unfitness of the pound, by showing that it was *generally* in good condition,¹ or that he did not know of its bad condition,² or that it was the only pound provided by the town or parish;³ for if that is in bad condition he may put the cattle elsewhere. He is bound to provide them with sufficient food and drink;⁴ but he is not liable for injuries received by the cattle from other animals in the pound.⁵ The right of an owner of land on which trespassing animals are found, to hold them until the damages are paid, as at common law, does not exist in this country.⁶

§ 642. [omitted.]

§ 643. **Injuries to a dog fighting another.**—Where one dog kills or injures another dog, the owner of the injured dog may recover damages from the owner of the other, in a proper case;¹ but in determining the question of liability, the nature of the species of animal must be taken into account. An action will not lie for every dog-fight.² It is the well-known nature of such animals, especially among the larger breeds, to fight upon slight provocation; and some allowance must be made for this. In order to recover in such a case, it has been held necessary to prove that the victorious dog was the aggressor, that his master had notice of his vicious disposition toward other dogs, that the injured dog did not provoke the assault, and that his master did not, by his want of ordinary care, expose him to the injury suffered.³ The last point, however, is, in most courts, matter of defense.

len v Fandrye, Popham, 161; s. c., *sub nom.* Millen v. Fawtreay, W. Jones, 131.

¹ Wilder v. Speer, 8 Ad. & El. 547; approved in Bignell v. Clarke, 5 Hurlst. & N. 485.

² Bignell v. Clarke, 5 Hurlst. & N. 485.

³ Bignell v. Clarke, *supra*; Wilder v. Speer, *supra*.

⁴ Adams v. Adams, 13 Pick. 384.

Whether defendant was reasonably diligent in impounding straying cattle is question for the jury (Angell v. Simmons, 10 R. I. 418).

⁵ Brightman v. Grinnell, 9 Pick. 14.

⁶ See Northcott v. Smith, 4 Ohio C. Ct. 565.

¹ Wheeler v. Brant, 23 Barb. 324.

² Wiley v. Slater, 22 Barb. 506.

³ Wiley v. Slater, *supra*.

CHAPTER XXXI.

DRIVING AND RIDING.

§ 644. Management of horses and vehicles.	§ 649. Rule of the road.
645. Examples of negligence.	650. [consolidated with § 649.]
646. Rate of speed.	651. Persons on wrong side assume risk.
647. Injuries from driving vicious or runaway horses.	652. Application of rule of the road.
648. [consolidated with § 647.]	653. Cycling.
	654. Contributory negligence.

§ 644. **Management of horses and vehicles.**—The rider or driver of a horse¹ must use ordinary care in its management, and is liable for all damages occasioned by his careless driving.² He is bound either to have an ordinary degree of acquaintance with the nature of horses, and to have and use ordinary skill in their management,³ or else to confine his exercises in horsemanship to his own land. But he is not bound to know the peculiar nature of the particular horse which he drives; and it is therefore not negligence *per se* to drive through the highway a horse that is in fact unmanageable, if the driver had no notice of its character.⁴ One who drives in a crowded road⁵

¹ For the sake of brevity and simplicity, horses only are mentioned here; but it is to be understood that the same rules are of course applicable to the management of any other animal under like circumstances.

² In the following cases, held trespass would lie for careless driving: *Pitts v. Gaince*, 1 *Ld. Raym.* 558; *Leame v. Bray*, 3 *East*, 593; *Dean v. Braithwaite*, 5 *Esp.* 35; *Hopper v. Reeve*, 7 *Taunt.* 698; *Bishop v. Ely*, 9 *Johns.* 294; *Strohl v. Levan*, 39 *Pa. St.* 177; *Waldron v. Hopper*, *Coxe*, 339; *Rappelyea v. Hulse*, 7 *Halst.* 257; *Clafin v. Wilcox*, 18 *Vt.* 605; *Daniels v. Clegg*, 28

Mich. 32. Case held a proper remedy, in *McAllister v. Hammond*, 6 *Cow.* 342; *Barnes v. Hurd*, 11 *Mass.* 57; *Reynolds v. Clarke*, 2 *Ld. Raym.* 1402; *Morley v. Gaisford*, 2 *H. Bl.* 442; *Hall v. Pickard*, 3 *Campb.* 187.

³ But it is not negligence, as matter of law, for a one-armed man (*Reynolds v. Hanrahan*, 100 *Mass.* 313), or for a woman (cases cited in note 1, § 379, *ante*), to drive a horse.

⁴ *Hammack v. White*, 11 *C. B. N.* S. 588.

⁵ *Garmon v. Bangor*, 38 *Me.* 443; *Williams v. Richards*, 3 *Carr & K.* 81; see *Edsall v. Vandemark*, 39 *Barb.* 589. Evidence that there was more travel upon a particular street

or in fog⁶ or darkness⁷ must take more care than would be required of him if such were not the case. And if the unusual character of the vehicle,⁸ or the load carried on it,⁹ are calculated to endanger other travelers, the driver is bound to take more than ordinary precautions to prevent the frightening of horses, or other injury being done. His duty to use care is owing not merely to persons technically traveling on the highway, but to every person lawfully there, *e. g.*, laborers employed thereon,¹⁰ and the fact of such employment may require, on his part, greater vigilance in avoiding them than would be necessary in the case of persons not preoccupied with their work.¹¹ As in other cases, the neglect of a duty will not alone sustain an action, without evidence that it was the proximate cause of the plaintiff's injury.¹²

§ 645. **Examples of negligence.** — It has been held to be culpable negligence (among other things) for the rider or driver of a horse to fail to maintain a general observation of

than upon any other street in the city is competent to show the impropriety of defendant's driving at an immoderate rate of speed on that street (*Stringer v. Frost*, 116 Ind. 477; 19 N. E. 331).

⁶ *McManus v. Woolverton* [Com. Pleas], 19 N. Y. Supp. 545.

⁷ *Meyer v. Lewis*, 43 Mo. App. 417.

⁸ *Atkinson v. Illinois Milk Co.*, 44 Mo. App. 153 [horse and wagon decorated with flags, etc., frightening another horse].

⁹ In transporting unusual machinery over a highway, a sufficient number of men should be employed to warn travelers of their danger, and if necessary to assist them in passing it (*Bennett v. Lovell*, 12 R. I. 166). See *Landa v. McDermott* [Tex.], 16 S. W. 802 [hay wagon in narrow street].

¹⁰ *Riley v. Farnum*, 62 N. H. 42; *Smith v. Bailey*, 14 N. Y. App. Div. 283; 43 N. Y. Supp. 856; *Quirk v. Holt*, 99 Mass. 164.

¹¹ *Smith v. Bailey*, *supra* [street
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sweeper]; *Anselment v. Daniell*, 4 N. Y. Misc. 144; 23 N. Y. Supp. 875 [pavier]; *Byrne v. Knickerbocker Ice Co.*, 56 N. Y. Superior, 337; 4 N. Y. Supp. 531 [ambulance driver, having statutory right of way].

¹² Thus an unlawful omission to provide bells on sleigh-horses is not enough to entitle a plaintiff, in a case of collision, to a verdict, without some evidence showing that the collision was brought about by the want of warning which the bells would have given (*Kidder v. Dunstable*, 11 Gray, 342; *Counter v. Couch*, 8 Allen, 436). A recovery is not justified by evidence that plaintiff fell in front of defendant's horse and wagon while attempting to cross a street, without proof that he was struck or knocked down by the horse or wagon (*Richard v. Sanford*, 73 Hun, 133; 28 N. Y. Supp. 956). That the driver was intoxicated when he ran against plaintiff is *some* evidence of negligence (*Wynn v. Allard*, 5 Watts & S. 524).

the road so as to avoid collision with other travelers,¹ to start suddenly and rapidly into the street, without keeping the horse well in hand, or looking to see if the way is clear.² So it is to drive rapidly through a crowd of children,³ to suddenly start up a horse, while close behind another traveler,⁴ to drive so recklessly as to frighten a team in front,⁵ to pass a vehicle in front, whether moving or standing still, so as to come in con-

¹ *Ledig v. Germania Brewing Co.*, 153 Pa. St. 298; 25 Atl. 870. s. p., *Moebus v. Hermann*, 108 N. Y. 349; 15 N. E. 415 [driver looking back talking to a fellow-servant behind; if he had been looking, could have prevented the injury]; *Wolff Mfg. Co. v. Wilson*, 152 Ill. 9; 28 N. E. 694 [in backing to curb, knocked over post, which fell on passer-by]; *Elze v. Baumann*, 2 N. Y. Misc. 72; 21 N. Y. Supp. 782 [driver not looking ahead]; *Thompson v. National Exp. Co.*, 66 Vt. 358; 29 Atl. 311 [driver of express wagon drove at a trot, looking at the stores along one side of the street, for business, without observing or managing his team]. See *McCloskey v. Chautauqua Ice Co.*, 174 Pa. St. 34; 34 Atl. 287 [backing up to curb without looking behind]. It is negligence for a street-car driver, after stopping his car on a busy street, to detach his horses, and swing them from the track into the street, without observing whether any teams are approaching from the rear, whereby a collision occurs (*Sutter v. Omnibus Co.*, 107 Cal. 369; 40 Pac. 484). It is sufficient for submission of question of negligence to jury that the driver of a heavily loaded wagon, on a descending grade, with nothing apparently to distract his attention, ran over and fatally injured a child at a street crossing (*Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; 18 N. E. 108). For other examples of negligence at crossings, see *Murphy v. Orr*, 96 N.

Y. 14; *Moskovitz v. Lighte*, 68 Hun, 102; 22 N. Y. Supp. 732 [child injured]. *Pressman v. Mooney*, 5 N. Y. App. Div. 121; 39 N. Y. Supp. 44 [same]; *Atkinson v. Oelsner*, 57 Hun, 592; 10 N. Y. Supp. 822. Where plaintiff was attempting to pass defendant, who was driving in the same direction, it is for the jury to say whether defendant, in the exercise of reasonable care, should have looked behind or sideways to avoid a collision (*Rand v. Syms*, 162 Mass. 163; 38 N. E. 196). Where the only evidence of the negligence of the driver of an omnibus in running over a pedestrian was that his head was turned another way to speak to the conductor, held, not a *prima facie* case of negligence (*Cotton v. Wood*, 8 C. B. N. S. 568).

² *Phelps v. Wait*, 30 N. Y. 78; *Scotti v. Behsmann*, 81 Hun, 604; 30 N. Y. Supp. 990 [driver turned suddenly into street, without warning]; *Murphy v. Nassau El. R. Co.*, 19 N. Y. App. Div. 583; 46 N. Y. Supp. 283; *Geraty v. Nat. Ice Co.*, 16 N. Y. App. Div. 174 [sudden start threw off load on traveler].

³ *Edsall v. Vandemark*, 39 Barb. 589.

⁴ *Center v. Finney*, 17 Barb. 94; aff'd, Seld. Notes, 80; *Ottendorff v. Willis*, 80 Hun, 262; 30 N. Y. Supp. 168; *Thomas v. Royster*, 98 Ky. 206; 32 S. W. 613.

⁵ *Burnham v. Butler*, 31 N. Y. 480; *Howe v. Young*, 16 Ind. 312.

tact with it or any one in it,⁶ or to put spurs to a horse when in close proximity to a person, whom it kicks.⁷ Allowing one's horses and vehicle to go unattended on the highway, or attended by himself at such a distance that he cannot control them in an emergency,⁸ or leaving a horse untied in a street, or so carelessly tied or attended that it strolls or runs away and causes an injury,⁹ will warrant a finding of negligence. And the fact that the horse was newly bought and had been driven but little, so far from excusing the owner's negligence, makes it the more culpable.¹⁰ The fact that the horse ran away from fright caused by the act of a third person, does not make that act necessarily the proximate cause of the damage done by the horse.¹¹

§ 646. **Rate of speed.** — It is culpable negligence to ride at such a speed as will make it impossible to check the horse in time to avoid obstacles which may reasonably be anticipated on the road, or to turn it aside upon meeting or passing other

⁶ Knowles v. Crampton, 55 Conn. 336; 11 Atl. 593; Post v. Olmsted, 47 Neb. 893; 66 N. W. 828 [horse stepped on boy's clothes and dragged him off]. Plaintiff was struck in the back by the shaft of defendant's cab, whose driver was endeavoring to get ahead of a line of teams; verdict for plaintiff sustained (Chicago Cab Co. v. McCarthy, 35 Ill. App. 199).

⁷ And this, without proof that the horse was vicious (North v. Smith, 10 C. B. N. S. 572).

⁸ Welling v. Judge, 40 Barb. 193.

⁹ Pearl v. Macaulay, 6 N. Y. App. Div. 70; 39 N. Y. Supp. 472; Doherty v. Sweetser, 82 Hun, 556; 31 N. Y. Supp. 649 [burden on defendant to disprove negligence]; Wasmuth v. Butler, 86 Hun, 1; 33 N. Y. Supp. 108; Doyle v. Detroit Omnibus Co., 105 Mich. 195; 62 N. W. 1031 [question for jury]; Griggs v. Fleckenstein, 14 Minn. 81 [same]; Phillips v. De Wald, 79 Ga. 732; 7 S. E. 151

[gentle horse; owner near; question for jury]; Pierce v. Conners, 20 Colo. 178; 37 Pac. 721; Griffiths v. Clift, 4 Utah, 462; 11 Pac. 609; Moulton v. Aldrich, 28 Kans. 300; see Neanow v. Uttech, 46 Wisc. 581; Loeser v. Humphrey, 41 Ohio St. 378; Street v. Laumier, 34 Mo. 469; Albert v. Bleecker St. R. Co., 2 Daly, 389; Rumsey v. Nelson, 58 Vt. 590; 3 Atl. 484; Jones v. Belt, 8 Houst. 562; 32 Atl. 723; Bowen v. Flanagan, 84 Va. 313; 4 S. E. 724. and cases cited under § 629, *ante*. Whether it was negligence for the owner of horses not known to be vicious to leave the team unhitched in charge of a boy, who was crippled in one arm, held, question for jury (Miller v. Strivens, 48 Neb. 458; 67 N. W. 458).

¹⁰ Henry v. Klopfer, 147 Pa. St. 178; 23 Atl. 337.

¹¹ Rolipillon v. Abbott, 49 Hun, 607; 1 N. Y. Supp. 662.

travelers, who are themselves acting prudently.¹ But within this limit, any lawful degree of speed may be justified.² A rider is not bound to reduce his speed to such a rate as may be necessary to avoid harm to people crossing the road in an unreasonable and improper manner, when he has no reason to expect that they will do so. On a country road, therefore, upon which travelers are few, and foot passengers very rare, ten or twelve miles an hour would be no excessive speed; while in a crowded street such a rate of traveling would be highly culpable. So a rate of speed might be perfectly proper on all the rest of the road, which would be excessive and dangerous at a much frequented crossing. At such a place a horse must be driven slowly and cautiously.³ A statute or ordinance regulating the rate of speed to be used at a particular place should be taken into consideration, in determining whether the speed of a horse at that place was excessive.⁴ Racing horses on a highway is itself such an act of negligence as will render the parties to it responsible for a collision caused thereby;⁵ and when its practice within a particular area is made unlawful by statute, besides being in violation of an ordinance against immoderate driving, the drivers of both teams are jointly and severally liable as trespassers for the death of a third person, without fault on his part, though but one of them came into actual contact with the deceased.⁶

¹ *Post v. U. S. Exp. Co.*, 76 Mich. 574; 43 N. W. 636 [hurrying across railroad]; *Payne v. Smith*, 4 Dana, 497; *Robinson v. Simpson*, 8 Houst. 398; 32 Atl. 287. See *Davies v. Mann*, 10 M. & W. 546. Driving at reckless speed on a public street cannot be excused by showing an urgent necessity therefor (*Eaton v. Crips*, 94 Iowa, 176; 62 N. W. 687).

² Elsewhere, any rate of speed, under that forbidden by ordinance, is not negligence *per se* (*Crocker v. Knickerbocker Ice Co.*, 92 N. Y. 652; *Denman v. Johnston*, 85 Mich. 387; 48 N. W. 565). There must be shown, in addition, some lack of proper care or prudence on the part of the driver (*Ib.*).

³ *Williams v. Richards*, 3 Carr. &

K. 81. See *Welch v. Wesson*, 6 Gray, 505; *Hall v. Ripley*, 119 Mass. 135; *Sykes v. Lawlor*, 49 Cal. 236; *Urquhart v. Boutell*, 15 Mo. App. 592.

⁴ *Barrett v. Smith*, 128 N. Y. 607; 28 N. E. 23; *Moody v. Osgood*, 60 Barb. 644; *aff'd in Ct. of App.*; see *Williams v. O'Keefe*, 9 Bosw. 536. There being evidence that the plaintiff did not see the approaching team, a city ordinance regulating the speed of vehicles upon public streets is competent evidence (*Eaton v. Crips*, 94 Iowa, 176; 62 N. W. 687).

⁵ *Potter v. Moran*, 61 Mich. 60; 27 N. W. 854; *Middlestadt v. Morrison*, 76 Wisc. 265; 44 N. W. 1103.

⁶ *Hanrahan v. Cochran*, 12 N. Y. App. Div. 91; 42 N. Y. Supp. 1031.

§ 647. Injuries from driving vicious or runaway horses. —

The owner of a horse is not responsible for injuries committed by it purely from its own vicious disposition, while he or his servant is driving it, unless it appears that he had notice of its disposition.¹ It is not culpable negligence to ride such a horse in a public place, without previously testing its nature.² If, therefore, a horse runs away out of mere viciousness, of which its owner had no notice, the latter is not liable for a collision thereby caused.³ Nor in any case is the owner liable for injuries caused by the running away of his horse through fright or something else over which he has no control; it must be shown that the running away and the consequent injury would not have occurred but for his negligence in the use or management of the horse.⁴ No law compels a driver to keep his horses absolutely under control; all that he is required to do is to exercise that degree of care which a man of ordinary prudence might be expected to exercise under the same circumstances.⁵ If his loss of control was due to careless driving,⁶ or to some defect in his harness or vehicle⁷ of which he had notice, actual or implied, which caused the horse to run away, he is liable for a consequent injury caused by it.

¹ Hammack v. White, 11 C. B. N. S. 588. See § 629, *ante*.

² Hammack v. White, *supra*.

³ Hammack v. White, *supra*; Sullivan v. Scripture, 3 Allen, 564. The vicious or dangerous character of the horses is a question for the jury, where there is evidence that they had previously run away and that defendant knew it (Benoit v. Troy, etc. R. Co., 77 Hun, 576; 28 N. Y. Supp. 1024). But the mere fact of driving a balky horse in a public street is not negligence *per se* (Chamberlain v. Wheatland, 54 Hun, 635; 7 N. Y. Supp. 190).

⁴ Negligence will not be presumed from the mere fact that a horse runs away (McCauley v. New York, 67 N. Y. 602; Unger v. Forty-second street R. Co., 51 Id. 497 [whiffletree broke]; Holmes v. Mather, L. R. 10 Ex. 261; Manzoni v. Douglas, L. R. 6 Q. B.

Div. 145; Gottwald v. Bernheimer, 6 Daly, 212; Quinlan v. Sixth Ave R. Co., 4 Id. 487; Herrick v. Sullivan, 120 Mass. 576 [horse frightened by passing train at crossing]; O'Brien v. Miller, 60 Conn. 214; 22 Atl. 544 [horse frightened by cars]. See But-ton v. Frink, 51 Conn. 342 [burden of proving negligence on plaintiff]; Stevens v. Dudley, 56 Vt. 158; Forney v. Geldmacher, 75 Mo. 113; Campbell v. Stillwater, 32 Minn. 308.

⁵ Cadwell v. Arnheim, 152 N. Y. 182; 46 N. E. 310; Miller v. Cohen, 173 Pa. St. 488; 34 Atl. 219.

⁶ Whissler v. Walsh, 165 Pa. St. 352; 30 Atl. 981 [driver failed to relieve horse entangled in harness].

⁷ Unger v. Forty-second St. R. Co., 51 N. Y. 497 [whiffletree]; Newcomb v. Van Zile, 34 Hun, 275 [traces broke]; Aldrich v. Monroe, 60 N. H. 118.

§ 648. [consolidated with § 647.]

§ 649. **Rule of the road.**—It is a universal custom in America for travelers, vehicles and animals under the charge of man, to take the right hand of the road when meeting each other, if it is reasonably practicable to do so; and this rule is enforced by statute in many states, so far as it relates to travelers in vehicles or on horseback.¹ The statutes upon this subject generally prescribe that travelers shall pass to the right of the “center of the road.” This means the center of the lawfully worked part of the road. No one is bound to leave that part of the road, while there is room for other travelers upon it, even though the smooth part be entirely on one side of the road.² The fact that a person managing a horse or a vehicle was on the wrong side of the road, at the time of a collision with a person coming toward him, is *prima facie* evidence of negligence on his part,³ but may be explained and justified, as where he was drawing up to his stopping-place,⁴

¹ Luedtke v. Jeffery, 89 Wisc. 136; 61 N. W. 292; Meservey v. Lockett, 161 Mass. 332; 37 N. E. 310; Earing v. Lansingh, 7 Wend. 185. A mail stage-coach is protected by act of Congress from obstruction, but is subject in all other respects to the laws of the road (Bolton v. Colder, 1 Watts, 360). In New York (L. 1879, c. 186), an ambulance has the right of way (see Byrne v. Knickerbocker Ice Co., 56 N. Y. Superior, 337; 4 N. Y. Supp. 531; Smith v. American So. 7 N. Y. Misc. 158; 27 N. Y. Supp. 315). In England, while foot-passengers take the right hand when meeting, the opposite rule governs horses and vehicles, which always take the left of the road (Turley v. Thomas, 8 Carr. & P. 103).

² Earing v. Lansingh, 7 Wend. 185; Palmer v. Barker, 2 Fairf. 338; Daniels v. Clegg, 28 Mich. 32. But see Dudley v. Bolles, 24 Wend. 465; The rights of travelers on a public highway are mutual and co-ordinate,

and it is the duty of each to so use his right of passage as not to injure another having a like right; and one is responsible for an injury caused to the other, when he could have avoided it without leaving the beaten track (Pigott v. Engle, 60 Mich. 221; 27 N. W. 3).

³ Randolph v. O'Riorden, 155 Mass. 331; 29 N. E. 583; Meservey v. Lockett 161 Mass. 332; 37 N. E. 310; Burdick v. Worrall, 4 Barb. 596; Earing v. Lansingh, 7 Wend. 185; Brooks v. Hart, 14 N. H. 307; Kennard v. Burton, 25 Me. 39. See Daniels v. Clegg, 28 Mich. 32; Schmidt v. Harkness, 3 Mo. App. 585; Button v. Frink, 51 Conn. 342; Smith v. Conway, 121 Mass. 216.

⁴ A truck driver may, in order to reach the store of his employer, cross to the left side of street, and is bound merely to exercise ordinary care to avoid collision with vehicles approaching from the opposite direction (Peltier v. Bradley Co., 67

or to water his horse, or to turn out of the road;⁵ or the right side was blockaded.⁶ Nor is he even justified in a rigid adherence to his side, if by going a little on the other side he could avoid a collision.⁷ The roughness of the road upon its right side is no excuse for not taking it, unless so great as to present a serious obstacle to its use.⁸ A traveler is not required to adhere rigidly to his own side of the road, at a time during daylight when no other traveler is in sight.⁹ The rule of the road must be very strictly observed at night or in a dense fog; and, at such times, the fact that there is no other person on the road is not a sufficient excuse for deviating from the proper side.¹⁰

§ 650. [consolidated with § 649.]

§ 651. Persons on wrong side assume risk.—A person excusably on the wrong side of the road must, however, leave much more than a sufficiency of room for other travelers.¹ He assumes the risk of all experiments in this direction, and is bound to use more care, and to keep a better lookout for approaching vehicles, than would otherwise be required of him;² while those who pass him on their proper side of the road have a right to presume that he will comply with the statute or custom, and that no greater caution or skill will be required on their part than would be necessary if he were on his own side of the road.³ By an unnecessary deviation from his proper side of the road, he takes the risk of the consequences which may arise from his inability to get out of the way of another traveler approaching on the right side of the road, and

Conn. 43; 34 Atl. 712). S. P., as to ice wagon crossing street to supply a customer (Young v. South Boston Ice Co., 150 Mass. 527; 23 N. E. 326).

⁵ See Burdick v. Worrall, 4 Barb. 596; Palmer v. Barker, 2 Fairf. 338.

⁶ Mooney v. Trow Directory Co., 2 N. Y. Misc. 238; 21 N. Y. Supp. 957.

⁷ O'Maley v. Dorn, 7 Wisc. 236; Turley v. Thomas, 8 Carr. & P. 103; see Chaplin v. Hawes, 3 Id. 554; Mayhew v. Boyce, 1 Stark. 423.

⁸ Earing v. Lansingh, 7 Wend. 185.

Compare Wordsworth v. Willan, 5 Esp. 273.

⁹ Foster v. Goddard, 40 Me. 64; Aston v. Heaven, 2 Esp. 533; see Smith v. Gardner 11 Gray, 418.

¹⁰ Per Lord Kenyon, Cruden v. Fentham, 2 Esp. 685; Shockley v. Shepherd, 9 Houst. 270; 32 Atl. 173.

¹ Chaplin v. Hawes, 3 Carr. & P. 554; Wordsworth v. Willan, 5 Esp. 273.

² Pluckwell v. Wilson, 5 Carr. & P. 375.

³ Wood v. Luscomb, 23 Wisc. 287.

will be responsible for injuries sustained by the latter while acting with ordinary care,⁴ and cannot recover for injuries sustained by himself,⁵ otherwise than by want of ordinary care on the part of the other traveler, after becoming aware of the danger to which both were exposed.⁶

§ 652. **Application of rule of the road.** — The “rule of the road,” as the rule requiring parties to keep to the right is commonly called, has no application to the meeting of railroad cars with vehicles of a different kind. The former cannot turn off their path; and the latter may and should turn to that side which appears, under the circumstances to be safest, without regard to the usual rule. The fact that either vehicle was, at the time of collision, on the left of the road, is therefore no evidence of negligence.¹ Nor does it extend to the case of a building moved along the road, upon rollers.² A traveler on foot or on horseback must give way to, and, if necessary, cross the road for, a vehicle with a heavy load;³ and a lightly loaded vehicle must in some cases give way to a heavily loaded one.⁴ But a team with a heavy load ought, without being asked, to stand still, if it cannot get out of the way, so as to let a lighter vehicle pass.⁵ As the terms in which we have stated the rule clearly imply, the law does not require either of two travelers going in the same direction to turn to the right of the other.⁶ On the contrary, the general rule is that the one overtaking

⁴ Brooks v. Hart, 14 N. H. 307.

⁵ Burdick v. Worrall, 4 Barb. 596. But compare Beckerle v. Weiman, 12 Mo. App. 354.

⁶ Spofford v. Harlow, 3 Allen, 176; Davies v. Mann, 10 Mees. & W. 546. See § 654, *post*.

¹ Hegan v. Eighth Ave. R. Co., 15 N. Y. 380; Culbertson v. Metropolitan R. Co., Mo. ; 36 S. W. 834. When a cart and a horse-car come into collision, while progressing side by side, with a space of one or two feet between them, the presumption of negligence is altogether against the driver of the cart (Suydam v. Grand Street, etc. R. Co., 41 Barb. 375). So one driving behind a car

should exercise special caution when passing it, to avoid injuries to passengers coming out (Belton v. Baxter, 33 N. Y. Superior, 182; 54 N. Y. 245; 58 Id. 411; see Moody v. Osgood, 50 Barb. 644.)

² Graves v. Shattuck, 35 N. H. 257.

³ Beach v. Parmeter, 23 Pa. St. 196. There the rule was applied in favor of a wagon carrying three persons. So in Washburn v. Tracy (2 Chipm. 136), it was said that a rider on horseback should give way to a vehicle.

⁴ Grier v. Sampson, 27 Pa. St. 183; Wrinn v. Jones, 111 Mass. 360; McLane v. Sharpe, 2 Harringt. 481.

⁵ Kennard v. Burton, 25 Me. 39.

⁶ Bolton v. Colder, 1 Watts, 360.

should pass to the left. But they must pass each other in such manner as may be most convenient under the particular circumstances.⁷ Nor has the rule any application in favor of persons crossing or turning into the road; and in an action by such a person for injuries received from a collision with a traveler going along the road, the fact that the latter was on the wrong side of the road is no evidence of negligence.⁸

§ 653.* Cycling. — The immense development of bicycling has made it necessary to reconsider the law as to vehicles, with reference to this mode of travel; which, although not literally new, is, in its most important features, of recent date; and the magnitude of which is absolutely new. Velocipedes have long been known, although not much used, in former years, except as toys. But the bicycle is a very modern invention; and its wide use has only been possible within the last few years. Cycles of every kind are "vehicles," and subject to the law of vehicles, so far as reasonably applicable.¹

⁷ *Avegno v. Hart*, 25 La. Ann. 235. It is not *per se* negligent for one to try, with reasonable care, to pass (*Fopper v. Wheatland*, 59 Wisc. 623; 18 N. W. 514; *Mochler v. Shaftsbury*, 46 Vt. 580).

⁸ So held in the case of a foot passenger crossing the road (*Lloyd v. Ogleby*, 5 C. B. N. S. 667); and in the case of a vehicle turning into the road (*Lovejoy v. Dolan*, 10 Cush. 497); or meeting another at the junction of two streets (*Norris v. Saxton*, 158 Mass. 46; 32 N. E. 954). So in *Smith v. Gardner* (11 Gray, 418), it was held that the mere fact that a carriage was unnecessarily on the left of the road does not prevent its owner from recovering damages for a collision with another carriage turning in from a cross road. S. P., *Broult v. Hanson*, 158 Mass. 17; 32 N. E. 900. A person driving across the street is bound to see that he does not interfere with others in the proper exercise of their right of passing (*Fales v. Dearborn*, 1 Pick. 345).

* This section is new. The former § 653 related to sleighs. It is omitted because there are apparently no reported decisions turning upon any rules peculiar to sleighing.

¹ *Thompson v. Dodge*, 58 Minn. 555; 60 N. W. 545; *State v. Collins*, 16 R. I. 371; 17 Atl. 131. Some points of difference are obvious. Thus a bicyclist cannot stand still or go backward, and therefore he is often justified in going forward, when the driver of a wagon would be required to stand still or even to pull backward. He frequently cannot safely ride over rough places, or holes or in ruts, such as would be no hindrance to an ordinary vehicle. None but a very expert cyclist can look behind him, while in motion. Therefore, these and similar limitations to the power of a rider to control his wheel must be allowed for, in judging of his care and diligence, or in requiring him to give way to other riders or vehicles.

They have equal rights on the road with other vehicles,² including cars running on tracks laid upon a highway;³ and the fact that a horse is unfamiliar with them and is frightened by the sight of them is not of itself evidence of negligence in their use.⁴ Cyclists are subject to the general "rule of the road," as to keeping to the right or left;⁵ and, in view of the light weight of the average cycle and the ease with which it can be guided, a cyclist is bound to give way, to a reasonable extent, to heavier vehicles, without insisting too strenuously upon literal compliance with the rule on the part of such vehicles.⁶ But, until good reason appears to the contrary, a cyclist is entitled to assume that every approaching vehicle will conform to the rule of the road.⁷ Cyclists are also bound to keep a reasonably vigilant watch for approaching vehicles, coming from any direction, even from behind;⁸ but, as they cannot conveniently look behind them, they are generally only bound to listen and not to look.⁹ This is especially the case with a bicyclist; since it is impossible for any, except a thorough expert, to look backward while in even fairly rapid motion. Therefore, having a right to ride in the center of a railroad track, laid along a highway,¹⁰ a bicyclist is not in fault for not looking backward, to see if a car is coming;¹¹ although he is in fault if he neglects

² *Holland v. Barch*, 120 Ind. 46; 22 N. E. 83. A bicycle is a vehicle, and has the same right on a street as any other vehicle (*Lindsay v. Winn*, 3 Pa. Dist. 811), including the right to leave it standing there for a reasonable time and purpose (*Id.*). A person driving a horse on a highway has no rights superior to those of a person riding a bicycle (*Thompson v. Dodge*, 58 Minn. 555; 60 N. W. 545). A traveler has a right to leave his bicycle for a reasonable length of time on the side of the highway or street, placed in a proper manner, so as not to interfere with the rights of others, while calling at the residence or place of business of an abutting owner or occupant, and the person who negligently injures a vehicle so left is liable (*Lacy v. Winn*, 4 Pa. Dist. 409).

³ *Rooks v. Houston St. R. Co.*, 10 N. Y. App. Div. 98.

⁴ *Holland v. Barch*, 120 Ind. 46; 22 N. E. 83; *Thompson v. Dodge*, 58 Minn. 555; 60 N. W. 545).

⁵ *State v. Collins*, 16 R. I. 371; 17 Atl. 131.

⁶ So held in a recent Pennsylvania case, not yet regularly reported.

⁷ *Schimpf v. Sliter*, 64 Hun, 463; 19 N. Y. Supp. 644.

⁸ See *Everett v. Los Angeles R. Co.*, 115 Cal. 105; 43 Pac. 207.

⁹ *Rooks v. Houston St. R. Co.*, 10 N. Y. App. Div. 98. The opinion of Barrett, J., in this case, is an admirable example of judicial common sense.

¹⁰ *Id.*

¹¹ *Id.*

to get out of the way, when sufficiently warned by a car gong or similar signal.¹² The running of a cycle along a sidewalk is frequently prohibited by statutes or local ordinances, sometimes with reasonable exceptions and sometimes absolutely.¹³ But even in the absence of a statutory regulation, it is presumptively improper to use a sidewalk for this purpose;¹⁴ and although the act may be justified by special circumstances (such as the defective character of the highway), yet a foot-passenger has always a superior right upon the sidewalk.¹⁵ Even on the main road, a cyclist is bound to keep vigilant watch for foot-passengers; and since it is so easy to guide a cycle, especially a bicycle, while its approach is so noiseless, negligence on the part of the cyclist is usually presumed, in case of collision with a foot-passenger by a cycle coming behind him, where no warning has been given.¹⁶ The omission of a suitable brake, a bell or (after dark) a lamp, is, of course, evidence of negligence, when such a thing is required by statute or ordinance;¹⁷ but such omission is also some evidence of negligence in any case where it proximately contributes to the injury, even though there is no such local regulation.¹⁸

§ 654. Contributory negligence. — As in other cases, no action can be maintained for an injury caused by the defendant's negligence in driving, if the plaintiff's own negligence proximately contributed to the injury and the defendant was not the last in fault.¹ This rule applies where the defendant is

¹² *Everett v. Los Angeles R. Co.*, 115 Cal. 105; 43 Pac. 207. The *dicta* in this case must be disregarded. Compare the opinion of Barrett, J., above cited. The actual *decision* was only as stated in the text.

¹³ In England, the statute makes no exceptions; and so, apparently, in Pennsylvania (*Com. v. Forrest*, 170 Pa. St. 40; 32 Atl. 652). In New York, this matter is left to the local authorities for regulation (*Laws* 1892, p. 2230); and they may authorize the use of sidewalks by bicycles (*Lechner v. Newark* [Sup. Ct. sp. term], 44 N. Y. Supp. 556), or prohibit such use.

¹⁴ One riding a bicycle on the sidewalk is liable for injuries to a person using the walk properly, though the injury was unintended (*Mercer v. Corbin*, 117 Ind. 450; 20 N. E. 132).

¹⁵ See same case.

¹⁶ *Myers v. Hinds* [Mich.], 68 N. W. 156.

¹⁷ See §§ 13, 646, *ante*.

¹⁸ So held, in a recent Nebraska case.

¹ *Barker v. Savage*, 45 N. Y. 191; *Weilling v. Judge*, 40 Barb. 193; *Burdick v. Worrall*, 4 Id. 596; *Bigelow v. Reed*, 51 Me. 325; *Washburn v. Tracy*, 2 Chipm. 136; *Parker v. Adams*, 12 Metc. 415; *Boland v.*

in fault for being on the wrong side of the road,² if he left ample room for plaintiff to pass him,³ unless, indeed, peculiar circumstances exist which relieve the plaintiff from the natural presumption of negligence.⁴ In crossing streets, a foot traveler has an equal right with vehicles, but no more.⁵ He must look before crossing;⁶ and, if vehicles are numerous, he must look

Missouri R. Co. 36 Mo. 484; Schaabs v. Woodburn, etc. Co, 56 Id. 173; Newhouse v. Miller, 35 Ind. 463; Strouse v. Whittlesey, 41 Conn. 559; Oglesby v. Smith, 38 Mo. App. 67 [breaking of plaintiff's reins]. The fact that plaintiff's horse, being momentarily uncontrollable, shies in consequence of the defendant's fault, and thereby causes the injury complained of, does not, of itself, constitute contributory negligence, and the question is for the jury (Macauley v. New York, 67 N. Y. 602). See Aznoe v. Conway, 72 Iowa, 568; 34 N. W. 422.

² Kennard v. Burton, 25 Me. 39; Parker v. Adams, 12 Metc. 415. But see Beckerle v. Weiman, 12 Mo. App. 354.

³ Clay v. Wood, 5 Esp. 44; Wordsworth v. Willan, Id. 273; Cruden v. Fentham, 2 Id. 685. In the last case, the jury found a verdict contrary to the ruling of Lord Kenyon upon this point; but the court refused to disturb the verdict, though approving this doctrine. If there was sufficient room for both to pass, and the collision could have been avoided if plaintiff had exercised due care, he cannot recover, though defendant did not turn to the right (Brember v. Jones, N. H. ; 30 Atl. 411). To support a judgment for plaintiff, it must appear that defendant saw or could have seen plaintiff in time to turn out, or that plaintiff did not discover, in time to avoid the accident, that defendant was not going to turn out (Walkup v. May, 9 Ind. App. 409; 36 N. E. 917).

⁴ See Damon v. Scituate, 119 Mass. 66; Smith v. Gardner, 11 Gray, 418; Parker v. Adams, 12 Metc. 415. Where defendant crosses the road and wantonly drives into plaintiff's horse approaching from the other direction, he will be liable, though plaintiff may himself have been careless in turning to the left instead of to the right (Tyler v. Nelson, Mich. ; 66 N. W. 671). The fact that one traveling with a vehicle on a street-railway track turns to the left, to allow a car to pass him, instead of to the right, is not, of itself, contributory negligence (Consolidated Tr. Co v. Reeves, 58 N. J. Law, 573; 34 Atl. 128). If plaintiff was driving as far to his right-hand side of the road as possible, he was not, as a matter of law, guilty of contributory negligence (Luedtke v. Jeffery, 89 Wisc. 136; 61 N. W. 292).

⁵ Pedestrians and drivers of vehicles have equal rights to use a street, and their duty to use care to avoid injury is reciprocal (Barker v. Savage, 45 N. Y. 191; Brooks v. Schwerin, Id. 343). It is not negligence *per se* for a person on foot to cross a city street at any hour of the day or night, elsewhere than at the crosswalks (Brusso v. Buffalo, 90 N. Y. 679; Murphy v. Orr, 96 Id. 14; Moebus v. Herrmann, 108 Id. 349; 15 N. E. 415).

⁶ A person who fails to look, while passing across a street, from the time he left the curbstone until he has reached a railroad track 22 feet distant from the curbstone, is guilty

both ways,⁷ though the same high degree of diligence is not required of him, as matter of law, as would be required at a railroad crossing.⁸ He should not take the chances of passing between wagons closely following one another; and he takes the risk, if he does.⁹ But where, seeing that the street is clear, and that he has ample opportunity to pass in front of an approaching vehicle, it is not negligent, as matter of law, to attempt to cross, although, by reason of the impetuous driving of the vehicle, he is struck before reaching the other side.¹⁰ If an approaching vehicle is in plain sight of a crossing, and the view towards it unobstructed, it is proof of negligence that one about to cross did not see it;¹¹ otherwise, if the view was obstructed.¹² The degree of care required of one attempting

of contributory negligence (*Henavie v. N. Y. Central R. Co.*, 10 N. Y. App. Div. 64; 41 N. Y. Supp. 935; *Williams v. Richards*, 3 Carr. & K. 81; approved by *Erle, C. J.*, *Cotton v. Wood*, 8 C. B. N. S. 568; *Montfort v. Schmidt*, 36 La. Ann. 750).

⁷ *Barker v. Savage*, 45 N. Y. 191. The text sustained (*Belton v. Baxter*, 54 N. Y. 245; *Brooks v. Schwerin*, Id. 343). See *Chaffee v. Boston*, etc. R. Co., 104 Mass. 108. But failure to look, before crossing a street, to see if anything was coming, held, not sufficient proof of contributory negligence (*Williams v. Grealy*, 112 Mass. 79). S. P., *Bowser v. Wellington*, 126 Mass. 391.

⁸ The degree of caution he must exercise will be affected by the situation and surrounding circumstances. In crossing a railroad, there is obvious and constantly impending danger, not easily or likely to be under the control of the engineer; in a street, the vehicles are managed without difficulty and injuries are infrequent (*Moebus v. Herrmann*, 108 N. Y. 349). Followed, *Eaton v. Crips*, 94 Iowa, 176; 62 N. W. 687; *Hall v. Ogden R. Co.*, 13 Utah, 243; 44 Pac. 1046.

⁹ *Belton v. Baxter*, 54 N. Y. 245. The question is for the jury (s. c., 58 Id. 411.)

¹⁰ *O'Reilly v. Utah, etc. Stage Co.*, 87 Hun, 406; 34 N. Y. Supp. 353; *McDonnell v. Elias Brewing Co.*, 19 N. Y. App. Div. 223; 46 N. Y. Supp. 25 [question for jury]; *Thompson v. Nat. Express Co.*, 66 Vt. 358; 29 Atl. 311. One is not negligent, as a matter of law, in not taking special precautions against the reckless conduct of defendant in riding at an unusual and dangerous rate of speed in the public street (*Stringer v. Frost*, 116 Ind. 477; 19 N. E. 331).

¹¹ *Harris v. Commercial Ice Co.*, 153 Pa. St. 278; 25 Atl. 1133; *Eckensberger v. Amend*, 10 N. Y. Misc. 145; 30 N. Y. Supp. 915.

¹² Plaintiff waited at a crossing for a cart to turn the corner before crossing over. Some planks dragging behind the cart swung around and struck plaintiff. Held, a non-suit was error; that plaintiff's failure to observe the unusual and dangerous appendage to the cart, and to calculate the sweep it would make was not conclusive evidence of contributory negligence, and the question should have been left to

to cross the track upon which a horse-car is approaching is the same as but no greater than that which ought to be used in respect to other vehicles.¹³ It is not negligence, as matter of law, for a pedestrian to walk on the carriageway of a country road, though there is a sidewalk;¹⁴ but on meeting a vehicle, he is under the same obligation as drivers are to use care to avoid a collision; he must not stubbornly stand in the traveled path.¹⁵ Nor is it negligence, as matter of law, for one to stand on, or walk along, the driveway of a city street;¹⁶ but inasmuch as doing so is unusual and obviously dangerous, drivers ought not to be held bound to anticipate it, and unless the driver saw him or ought to have seen him, or unless there was

the jury (*Sheehy v. Burger* 62 N. Y. 558). To the same effect, *Bueck v. Lindsay*, 65 Mich. 105; 31 N. W. 768. There being many people on the street at the time of the accident between plaintiff and the team, the question whether there was anything that prevented plaintiff from seeing the approaching team is properly submitted to the jury (*Eaton v. Crips*, 94 Iowa, 176; 62 N. W. 687).

¹³ *Baxter v. Second Ave. R. Co.*, 30 How. Pr. 219; and cases cited under § 472, *ante*. It is not negligence to attempt to cross street-car tracks when a car is from 25 feet to half a block away (*Kilbane v. Westchester R. Co.*, 19 N. Y. Misc. 184; 43 N. Y. Supp. 278). See *Galbraith v. West End R. Co.*, 165 Mass. 572; 43 N. E. 501; *Consolidated Tr. Co. v. Reeves*, 58 N. J. Law, 573; 34 Atl. 128. A trolley car, as between itself and other vehicles, has no paramount right at street crossings (*Brozek v. Steinway R. Co.*, 10 N. Y. App. Div. 360; 41 N. Y. Supp. 1017).

¹⁴ *Combs v. Purrington*, 42 Me. 332. A foot-passenger, though infirm, has a right to walk in the carriageway, and is entitled to the exercise of reasonable care on the part of persons driving along it (*Boss v. Litton*, 5 Carr. & P. 407). Compare cases

cited in note 21, § 375, *ante*. *Boick v. Bissell*, 80 Mich. 260; 45 N. W. 55 [plaintiff standing in roadway binding load of lumber on wagon]. See *Welling v. Judge*, 40 Barb. 193; *Grabruer v. Klein*, 81 Md. 53; 31 Atl. 504.

¹⁵ *Kendall v. Kendall*, 147 Mass. 482; 18 N. E. 233. In that case, held, that plaintiff's not stepping out of the path, into untrodden snow, was not conclusive of his negligence, on being struck by the projecting shafts of a sleigh, and that on evidence as to ill-will toward defendant, question of his negligence was properly submitted to the jury.

¹⁶ It is negligence for a driver whose horse is under perfect control, in daylight, to drive his wheel against a person whom he sees standing or walking, with his back towards him, on a street (*Murphy v. Weidman Co.*, 1 N. Y. App. Div. 283; 37 N. Y. Supp. 151). But a person heedlessly standing in the carriageway after nightfall, engaged in conversation, cannot recover for injuries received from a carelessly driven vehicle, the driver not having seen him in time to avoid collision (*Evans v. Adams Exp. Co.*, 122 Ind. 362; 23 N. E. 1039).

some reason for not using the sidewalk, the question of his contributory negligence is for the jury.¹⁷ A foot-passenger lawfully on the driveway is not bound, as matter of law, to keep a lookout for teams approaching from behind him.¹⁸ It is for the jury to say whether one who complains that his horse was frightened by the careless driving of another was himself guilty of contributory negligence in leaving it in the street unfastened and unattended.¹⁹ The fact that plaintiff violated an ordinance in leaving his vehicle standing in the highway is no excuse for defendant's negligently driving upon it.²⁰ In submitting the question of plaintiff's negligence in entering a carriage, knowing it dangerous to do so, by reason of the vicious character of the horses, the question of the reasonable

¹⁷A number of laborers were clearing snow from the middle of the street, and a wagon, proceeding slowly, ran over one of them; held, question of contributory negligence could not be taken from the jury (*Quirk v. Holt*, 99 Mass. 164). Compare cases cited under §§ 375, 472, *ante*. See *Lazell v. Kapp*, 83 Mich. 36; 46 N. W. 1028.

¹⁸It not appearing that the street was much thronged with vehicles, held, not negligence *per se* to go along the street, for a lawful purpose, without looking behind to see if vehicles might be approaching from that direction (*Undhejem v. Hastings*, 38 Minn. 485; 38 N. W. 488; *Wiel v. Wright*, 55 Hun. 611; 8 N. Y. Supp. 776 [boy dragging a hand-sled along street]). A passenger alighting from a street-car in the middle of the street, is not in fault in not looking back for approaching teams, before stepping off the car (*Sandifer v. Lynn*, 52 Mo. App. 553). In *Messenger v. Dennie* (137 Mass. 197), a boy nine years old, riding on the runners of a sleigh in the street, suddenly left the sleigh while in motion, without looking behind him, and a horse driven about thirty feet behind, struck him. Held, guilty of con-

tributory negligence. s. p., *Bierbach v. Goodyear Co.*, 14 Fed. 826; s. c., 15 Id. 490.

¹⁹*Park v. O'Brien*, 23 Conn. 339; *Albert v. Bleeker St. R. Co.*, 2 Daly, 389; *Streett v. Laumier*, 34 Mo. 469. In *Menger v. Laur* (55 N. J. Law, 205; 26 Atl. 180), held contributory negligence to set up a surveyor's instrument in the roadway of a street, where it was liable to injury from passing vehicles, and leave it without any one to look after its safety, or to warn persons of its presence.

²⁰*Steele v. Burkhart*, 104 Mass. 59; *Kearns v. Sowden*, Id. 63; *Neanow v. Uttech*, 46 Wis. 581; 1 N. W. 221. Compare *Le Baron v. Joslin*, 41 Mich. 313; *Joslin v. Le Baron*, 44 Id. 160; and see *Broschart v. Tuttle*, 59 Conn. 1; 21 Atl. 925, where it was held that plaintiff's violation of an ordinance prohibiting driving at a greater speed than a certain rate, if it directly contributed to injuries sustained in a collision with the team of another, due to the latter's negligence, is a conclusive bar to a recovery, and not merely a fact to be considered by the jury in connection with the other evidence on the question of contributory negligence.

necessity of doing so should also be submitted to the jury.²¹ Finally, under the general principle heretofore stated, the plaintiff's fault, to be available as a defense, must have proximately contributed to his injury.²²

²¹ *Smith v. Team*, Miss. ; 16 So. 492.

²² § 94, *ante*. The fact that plaintiff, injured by a collision between a street-car and an ice wagon, was standing on the platform of the car, when there were seats to be had inside, cannot be asserted as a defense by the owner of the ice wagon (*Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; 21 N. E. 101). Defendant and another person, who were racing with sleighs, at a very rapid rate, approached plaintiff from behind. Seeing one of them about to pass on one side, he turned his horse slightly to the other, and was struck by

defendant. Held, no evidence of contributory negligence (*Potter v. Moran*, 61 Mich. 60; 27 N. W. 854). The fact that plaintiff's hand projected outside his vehicle will not conclusively bar his recovery for an injury in a collision with defendant's vehicle, caused by defendant's negligence (*Seigel v. Eisen*, 41 Cal. 109). If defendant's negligence was the proximate cause of a collision with another vehicle, causing the horses attached thereto to run away, it is no defense that the runaway horses could have been checked by the exercise of due diligence (*Belk v. People*, 125 Ill. 584; 17 N. E. 744).

CHAPTER XXXII.

FENCES.

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| <p>§ 655. English common-law rule as to fences,</p> <p>656. Peculiar American common-law rule.</p> <p>657. Statutory regulations.</p> <p>658. Effect of contract to maintain fences.</p> <p>659. Who entitled to protection of animals by fence.</p> | <p>§ 660. Who entitled to protection against animals by fence.</p> <p>661. Who are liable for defects of fence.</p> <p>662. Injuries to animals from insufficient fence.</p> <p>663. Injuries by animals from insufficient fence.</p> <p>664. Division fences.</p> |
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§ 655. **English common-law rule as to fences.** — By the common law of England, which was always followed in Maine, New Hampshire, Vermont, Massachusetts, New York, New Jersey, Delaware, Maryland, Kentucky, Indiana, Michigan, Wisconsin, Minnesota and Kansas, and which has been restored by statutes in Pennsylvania¹ and Illinois,² the owners of land are under no obligation to fence cattle out, and the owner of cattle ought to keep them in.³

¹ In Pennsylvania, until 1889, the common-law rule was so far modified that nominal damages only were recoverable for trespass by cattle on uninclosed land (*Knight v. Abert*, 6 Pa. St. 472); but in that year, by the repeal of the act of 1700, the common-law rule was fully restored (*Arthurs v. Chatfield*, 9 Pa. Co. Ct. 34; *Thompson v. Kyler*, Id. 205; *Stewart v. Benninger*, 138 Pa. St. 437; 21 Atl. 159). This should have been stated in note 17, § 418, *ante*.

² By the act of 1874, which made it unlawful for stock to run at large, the common-law rule, that the owner of cattle must keep them on his own land, or respond in damages, was revived (*Bulpit v. Matthews*, 42 Ill.

App. 561; *affi'd*, 145 Ill. 345; 34 N. E. 525; *Birket v. Williams*, 30 Ill. App. 451). Before 1874, the rule was the other way (see note 1, § 419, *ante*; *Seely v. Peters*, 5 Gilm. 130.)

³ So held, in *Maine* (*Little v. Lathrop*, 5 Greenl. 357); *New Hampshire* (*Avery v. Maxwell*, 4 N. H. 36); *Massachusetts* (*Rust v. Low*, 6 Mass. 90; *Thayer v. Arnold*, 4 Metc. 589); *New York* (*Wells v. Howell*, 19 Johns. 385; *Stafford v. Ingersoll*, 3 Hill, 38; *Angell v. Hill*, 64 Hun, 633; 18 N. Y. Supp. 824); *New Jersey* (*Coxe v. Robbins*, 9 N. J. Law, 384); *Maryland* (*Richardson v. Milburn*, 11 Md. 340); *Indiana* (*Myers v. Dodd*, 9 Ind. 290; *Page v. Hollingsworth*, 7 Id. 317; *Brady v. Ball*, 14 Id. 317; *At-*

§ 656. **Peculiar American common-law rule.** — In many of the southern and western states the English common-law rule, concerning fences, has never been in force; the owner of animals is under no obligation to fence them in; and the occupant of unfenced land has no right to complain if they stray thereon. The absence of a fence is treated as an implied license from the owner of the unfenced land for the entry of all animals. This is the common law of Ohio, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Texas, Arkansas, Missouri, Iowa, Nebraska, and all states and territories west of Nebraska.¹ Of course, in all these states, the owner of an animal which breaks through a sufficient fence is liable for its trespass as at common law;² and he cannot recover for any injury suffered by the animal in consequence thereof.³ The owner of unfenced land, in any of these states, may drive off animals straying upon his land, in a reasonable and prudent manner.⁴

§ 657. **Statutory regulations.** — In some states where the English rule prevails at common law, statutes or local ordinances require the owner of land to fence it, the effect of which

kinson v. Mott, 102 Ind. 431; 26 N. E. 217; *Michigan* (*Johnson v. Wing*, 3 Mich. 163); and *Kansas* (*Markin v. Priddy*, 40 Kans. 684; 20 Pac. 474. And see other cases cited under § 418, *ante*.)

¹ This is settled as to all the territories and the new states west of the Mississippi by the decision in *Buford v. Houtz*, 133 U. S. 320; 10 S. Ct. 305. See railroad cases cited in note 1, § 419, *ante*; and, in addition, *Mann v. Williamson*, 70 Mo. 661; *Dickson v. Parker*, 3 How. [Miss.] 219; *Waters v. Moss*, 12 Cal. 535; *Comerford v. Dupuy*, 17 Id. 308; *Herold v. Meyers*, 20 Iowa, 378; *Wagner v. Bissell*, 3 Id. 396; *Barrett v. Dolan*, 71 Id. 94; 32 N. W. 189; *Seely v. Peters*, 5 Gilm. 130; *Stoner v. Shugart*, 45 Ill. 76; *Nuckolls v. Gaut*, 12 Colo. 361; 21 Pac. 41. In Iowa, it is held that one who causes his cattle to be herded upon the unimproved and

uninclosed prairie land of another, without the latter's consent, is liable therefor to the owner, though by the law of that state a trespass is not committed when cattle running at large enter uninclosed land (*Harrison v. Adamson*, 76 Iowa, 337; 41 N. W. 34).

² *McManus v. Finan*, 4 Iowa, 283; *Finley v. Bradley* [Tex. Civ. App.], 21 S. W. 609.

³ *Morrison v. Cornelius*, 63 N. C. 346; *Markin v. Priddy*, 39 Kans. 462; 18 Pac. 514.

⁴ He is responsible for want of ordinary care in so doing (see *Kerwhacker v. Cleveland*, etc. R. Co., 3 Ohio St. 172, 183). But he is not liable for what befalls them after being driven into the highway, and he has ceased pursuit (*Palmer v. Silverthorn*, 32 Pa. St. 65; and cases cited under § 640, *ante*).

is to deprive him of all right to complain of trespasses by animals through want of such fence.¹ Where, as in Maine, Vermont, New York, Indiana, and other states, the statute empowers a land-owner to repair, at the expense of an adjoining proprietor, fences which the latter ought to, but does not, keep in repair, this does not deprive the former of the right of action for injuries sustained by his cattle through the defect of the fence.² Neither does a provision enabling the injured party to obtain an appraisal of his damages from fence-viewers confine him to that remedy.³

§ 658. Effect of contract to maintain fences. — A contract to maintain a fence certainly deprives the person upon whom the duty of maintaining it is thus devolved, of all right, as against the other party to the contract, to complain of injuries suffered by his animals,¹ or by him, through the entry of animals upon his land,² for want of a sufficient fence; and if his

¹ See *Van Leuven v. Lyke*, 1 N. Y. 515, 517. Such is the effect of the statutes in force in *Connecticut* from the earliest period (*Studwell v. Ritch*, 14 Conn. 292; see *Wright v. Wright*, 21 Id. 329, 344; *Hine v. Wooding*, 37 Id. 123). For *New York* statute, see 1 Rev. Stat. 358, §§ 30, 31; L. 1866, ch. 540; *Cowles v. Balzer*, 47 Barb. 562; for that of *Vermont*, see Gen. Stat. 1863, ch. 102, § 2; *Holden v. Shattuck*, 34 Vt. 336; *Scott v. Grover*, 56 Id. 499; and for that of *Maine*, see Rev. Stat. 1857, ch. 23, §§ 4, 5. In *Indiana*, no damages are recoverable for the trespass of a domestic animal entering from the highway, unless the land was protected by such a fence as good husbandmen generally keep (1 Rev. Stat. 292); but as to animals entering from an adjoining close, the common law remains in force (*Myers v. Dodd*, 9 Ind. 290); while in *New Jersey* the entry of an animal from the highway is a trespass, no one being bound to fence against it (*Chambers v. Matthews*, 3 Harr. 368). See, as to *Kentucky*, *Willis v.*

Walters, 5 Bush, 351; as to *North Carolina*, *State v. Perry*, 64 N. C. 305; *Runyan v. Patterson*, 87 Id. 343; as to *Missouri*, *Moore v. White*, 45 Mo. 206; as to *Nevada*, *Chase v. Chase*, 15 Nev. 259. We cannot undertake to refer to all the peculiar statutes on that subject. Statutes in relation to fences are enacted for the benefit of owners of domestic animals, and not of wild ones; and any general phrases used in such statutes should be restricted accordingly (*Canefox v. Crenshaw*, 24 Mo. 119).

² *Saxton v. Bacon*, 31 Vt. 540; see *Eames v. Patterson*, 8 Greenl. 81; *Tupper v. Clark*, 43 Vt. 200; *Robinson v. Fetterman* [Pa.], 14 Atl. 245. In *Myers v. Dodd* (9 Ind. 290), it seems to have been assumed that the statutory remedy was exclusive.

³ *Stafford v. Ingersoll*, 3 Hill, 38.

¹ *Cincinnati, etc. R. Co. v. Watson*, 4 Ohio St. 424. Compare *Winters v. Jacobs*, 29 Iowa, 115, on a contract to enclose lands in common.

² *York v. Davis*, 11 N. H. 241; see *Rust v. Low*, 6 Mass. 90.

cattle stray upon land against which he has bound himself to fence, he is liable as a trespasser.³ Such a contract, once made, is irrevocable, except by mutual consent, or in some mode provided by statute, as by calling on the fence-viewers, whose jurisdiction is not precluded by a mere oral agreement.⁴ A duty to fence may also be established by prescription⁵ or by usage. And a usage to allow cattle to run at large, and to graze on unfenced ground, especially if practically adopted by the party complaining of their entry, is a good defense.⁶

§ 659. Who entitled to protection of animals by fence. —

The obligation to fence out animals, where it is imposed by law, only applies in favor of the owner of animals *lawfully* on the adjoining close.¹ And, therefore, the owner of an animal which, trespassing upon another's land, breaks through the defective fence between that land and the land of a third person, cannot recover damages for a consequent injury from the last-mentioned person, although he was bound to keep the fence in good repair.² Neither can the owner of cattle, not *lawfully* on the highway, complain of the want of a fence between the defendant's land and the highway,³ or avail himself of such defect as a defense to a claim for damage done by his cattle.⁴ Cattle left to stray on the highway are not lawfully there⁵ (in any state governed by the rules of the English common law), unless authorized so to stray by the legislature.

³ See *Cincinnati, etc. R. Co. v. Waterson*, 4 Ohio St. 424.

⁴ *York v. Davis*, 11 N. H. 241.

⁵ See *Rust v. Low*, 6 Mass. 90.

⁶ *Wheeler v. Rowell*, 7 N. H. 515.

¹ *Holliday v. Marsh*, 3 Wend. 142; *Lawrence v. Combs*, 37 N. H. 331; *Stackpole v. Healy*, 16 Mass. 33; *Lord v. Wormwood*, 29 Me. 282; *Little v. Lathrop*, 5 Greenl. 357. This is expressly provided by most of the statutes, and is to be implied where not so provided (*Rust v. Low*, 6 Mass. 90, 97).

² *Lawrence v. Combs*, *supra*.

³ *Holliday v. Marsh*, *supra*; *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101.

⁴ *Lyman v. Gipson*, 18 Pick. 422; *Stackpole v. Healy*, 16 Mass. 33.

⁵ *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101; *Avery v. Maxwell*, 4 N. H. 36; *Stackpole v. Healy*, 16 Mass. 33; *Chambers v. Matthews*, 3 Harrison, 368; *Hewitt v. Walker*, 2 Ill. App. 490; *Fillmore v. Booth*, 29 Kans. 134. In *Connecticut*, by an exception in the statute, peculiar to that state, the owner of an animal going at large contrary to law, or of such an unruly disposition that it will not be restrained by ordinary fences, is liable for its entry upon land of another person, though not sufficiently fenced (*Barnum v. Vandusen*, 16 Conn. 200).

§ 660. Who entitled to protection against animals by fence. — Only the adjoining owner is entitled to the benefit of a fence, as a protection against the trespasses of animals. A third person, not claiming under the adjoining owner, cannot complain of a defect in the defendant's fences, even though he may have suffered an injury from an animal, which he would not have suffered had the defendant maintained a proper fence.¹ In Maine, it is held that cattle allowed by vote of the town to roam on the highway are nevertheless not properly on land adjoining it, though unfenced; and therefore that if they stray through the land of A., lying unfenced by the highway, upon land of B., lying behind A.'s land, though also unfenced, B. can sue their owner for trespass.²

§ 661. Who are liable for defects in fence. — Not only is the land-owner himself, when in default with respect to fences which he was bound to maintain, liable for injuries done by his cattle through such defect of fences, but one whose cattle are upon the land is liable for the breach of his cattle upon the adjoining land.¹ The fact that they were lawfully upon the former premises does not affect the question.² It is the duty of one to whom an animal is bailed to pasture, in the absence of a contract to the contrary, to maintain a legal fence around the pasture; and he is liable for the animal's escape and loss through his neglect to do so.³

¹ *Ryan v. Rochester, etc. R. Co.*, 9 How. Pr. 453. In that case, the plaintiff was injured by a horse, belonging to one V. M., which strayed through a fence between the land of V. M. and of the defendant (which it was the defendant's duty to maintain), and fell upon the plaintiff. Held, he could not recover.

² *Lord v. Wormwood*, 29 Me. 282.

³ The lessee of land whose duty it is to make needed current repairs of the fences, and not the lessor, is liable for an insufficient fence (*Blood v. Spaulding*, 57 Vt. 422). S. P., *Firth v. Bowling Iron Co.*, L. R. 3 C. P. Div. 254. As between a tenant and his landlord, in the absence of any special covenant to the contrary,

it is incumbent on the tenant to keep fences in repair (*Hoyleman v. Kana-wha, etc. R. Co.*, 33 W. Va. 489; 10 S. E. 816).

² *Stafford v. Ingersoll*, 3 Hill, 38.

³ *Coffield v. Harris*, 2 Tex. App. Civ. Cases, § 315; *Lucia v. Meech*, 68 Vt. 175; 34 Atl. 695. It is immaterial in such case that the condition of the fence on other points was good; that other persons regarded defendant as a careful agister of horses, and intrusted valuable horses to her care; that the fence around the pasture compared favorably with other pasture fences; and that no other animals, to the knowledge of witness, had escaped (*Ib.*).

§ 662. **Injuries to animals from insufficient fence.** — The absence or insufficiency of a fence is generally, if not invariably, only the *remote* cause of an injury to animals.¹ The immediate cause is the danger upon which they fall, after coming within the bounds where the fence ought to be.² There must be some negligence in respect to this proximate cause of the injury, on the part of the defendant, in order to charge him with liability for it.³ If the danger to which animals are exposed, in case of their entry upon the land through the defective fence, is one which the defendant should reasonably have foreseen they would encounter, he is liable for it; but if otherwise, he is not.⁴ This is a question of fact, not of law.⁵ A land-owner, who does not maintain a fence, and thus leaves his land open to animals, may relieve himself of all liability for injuries happening to them from anything lawfully kept on his land, by giving warning thereof to the owners of the animals.⁶

§ 663. **Injuries by animals from insufficient fence.** — But the want of a proper fence is usually the proximate cause of an injury *by* animals; for it is evidently the immediate occasion of their trespass. No one can, therefore, recover damages for an injury done by animals lawfully upon the adjoining close, entering upon his land, at a place where he was bound to, but did not, maintain a sufficient fence,¹ unless the owner of the animal willfully turned it into the plaintiff's land,² or unless

¹ Cleveland, etc. R. Co. v. Elliott, 4 Ohio St. 474.

² *Ib.*; Woodward v. Griffith, 2 Tex. App. Civ. Cas., § 360 [barbed wire fence]. The liability of a land-owner for maintaining dangerous fences is reserved for mention in chap. xxxvi, *post*.

³ Cleveland, etc. R. Co. v. Elliott, 4 Ohio St. 474; Saxton v. Bacon, 31 Vt. 540; Holden v. Rutland, etc. R. Co., 30 Id. 297.

⁴ *Ib.*; see Powell v. Salisbury, 2 Younge & J. 391; *ante*, § 29.

⁵ Saxton v. Bacon, 31 Vt. 540.

⁶ Walker v. Herron, 22 Tex. 55. It appeared in that case that defendant kept diseased cattle on his unfenced land, but warned plaintiff to

keep his cattle off on that account; notwithstanding which the plaintiff's cattle strayed there, and caught the disease. Held, plaintiff could not recover. To same effect, Demitz v. Benton, 35 Mo. App. 559. For cases of injuries suffered by animals from poison, etc., see Morrison v. Cornelius, 63 N. C. 346; Herold v. Meyers, 20 Iowa, 378; Fennell v. Seguin St. R. Co., 70 Tex. 670; 8 S. W. 486; Firth v. Bowling Iron Co., L. R. 3 C. P. D. 254.

¹ Cowles v. Balzer, 47 Barb. 562, 573; Shepherd v. Hees, 12 Johns. 433; Page v. Olcott, 13 N. H. 399; Woodward v. Purdy, 20 Ala. 379.

² Broadwell v. Wilcox, 22 Iowa, 568.

the injury is such as he could recover upon, if the entry of the animal had been with his express permission,³ or unless the animal was one of a species, or belonged to an owner, in whose favor the obligation to fence did not apply. And if the outer boundary is unfenced, it is not a trespass for animals to break through an inner fence;⁴ the destruction of the inner fence being an injury of only the same character as the destruction of herbage, etc., for which it is well settled that no action will lie under such circumstances.

§ 664. **Division fences.** — States, which maintain the common-law rule that land-owners are only bound to fence in their own cattle, generally have statutes which impose on adjacent owners the duty of maintaining *division* fences, and declare the liability of one to the other for injuries suffered in consequence of his failure to perform such duty; but as such a statute does not concern the public generally, it will be strictly construed, and a recovery can only be had under it to the extent of the liability prescribed.¹ Where a division fence exists, and each adjoining owner has a definite portion assigned to his charge, he cannot recover from an adjoining owner for the breach of cattle through that portion of the fence, if it is defective;² but he may recover for their breach through any other place;³ and his right of recovery is

³ A young stallion leaped the fence of a lot in which he was put, and caused an injury to a person driving on the highway. Held, although the fence was such as was common among farmers, and was usually considered safe, the question whether it was sufficient to confine a vicious young stallion was properly submitted to the jury (*McIlvaine v. Lautz*, 100 Pa. St. 586). Where a bull escaped from the owner's premises into those of another, and, by agreement with such other, was allowed to remain over night, where he killed a horse belonging to a third person, being pastured there, Held, the owner was liable under the statute (*Duggan v. Hansen*, 43 Neb. 277; 61 N. W. 622).

⁴ Page v. Olcott, 13 N. H. 399.

¹ Thus, it is held that the New York statute (1 Rev. St. (5th ed.) p. 833), imposing a liability for "damages to the crops, fixtures," etc., does not authorize a recovery for the loss of a horse, which strayed into the adjacent premises, and was killed by falling into a pit (*Crandall v. Eldridge*, 46 Hun, 411).

² *Cowles v. Balzer*, 47 Barb. 562, 573; *Shepherd v. Hees*, 12 Johns. 433; *Saxton v. Bacon*, 31 Vt. 540; *Holden v. Rutland*, etc. R. Co., 30 Id. 297; *York v. Davis*, 11 N. H. 241; *Barrett v. Dolan*, 71 Iowa, 94; 32 N. W. 189; *Markin v. Priddy*, 39 Kans. 463; 18 Pac. 514. See *Duffees v. Judd*, 48 Iowa, 258.

³ *Burke v. Daley*, 32 Ill. App. 326.

not barred by the fact that he turned his cattle into his pasture with knowledge of the insufficiency of the fence, and of their liability to injury if they escaped into the adjoining land.⁴ If no particular portion has been assigned to the charge of any of the adjoining owners, it is held in Maine and Connecticut that none of them can recover for such breaches of cattle;⁵ while in New Hampshire, Massachusetts, New Jersey and Michigan, it is held that any of them can; their neglect to procure such an assignment being deemed equivalent to an election to occupy their land under the rules of the common law.⁶ One who throws down a division fence, so that his cattle escape through the breach thus made, is liable for the damage they may do.⁷

Under an agreement with an adjacent owner to maintain a division fence, he is liable for injuries to such adjacent owner's animals by reason of negligence in the construction of the fence (*Roney v. Aldrich*, 44 Hun, 320). The insufficiency of the fence must be the proximate cause of the injury to the animal; if it was proximately due to the nature of defendant's ground to which he crossed, the latter is not liable (*Fales v. Cole*, 153 Mass. 322; 26 N. E. 872).

⁴ So held in action under statute (*Eddy v. Kinney*, 60 Vt. 554; 15 Atl. 198).

⁵ *Gooch v. Stephenson*, 13 Me. 371; *Studwell v. Ritch.*, 14 Conn. 292.

⁶ *Tewksbury v. Bucklin*, 7 N. H. 518; *Thayer v. Arnold*, 4 Metc. 589; *Coxe v. Robbins*, 4 Halst. 384; *Johnson v. Wing*, 3 Mich. 163. See *Durbin v. Kennett*, N. H. ; 29 Atl. 414.

⁷ *Holladay v. Marsh*, 3 Wend. 142; *Moore v. Levert*, 24 Ala. 310; *Richardson v. Milburn*, 11 Md. 340.

CHAPTER XXXIII.

FIRE.

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| <p>§ 665. Fire accidentally kindled on one's own land.</p> <p>666. Liability for spread of fire.</p> <p>667. Proximate cause of injury.</p> <p>668. Fire purposely kindled.</p> <p>669. Fire kindled to clear land.</p> <p>670. Firing other land.</p> <p>671. Statutory liability.</p> <p>672. Fire communicated from locomotives.</p> <p>673. Duty to use approved appliances.</p> | <p>§ 674. Other neglect than want of approved appliances.</p> <p>675. Evidence of origin of fire.</p> <p>676. Burden of proof.</p> <p>677. [Omitted.]</p> <p>678. Combustibles on right of way.</p> <p>679. Contributory negligence.</p> <p>680. Negligent use of adjacent land.</p> <p>681. [Consolidated with § 680.]</p> <p>682. [Consolidated with § 679.]</p> |
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§ 665. Fire accidentally kindled on one's own land.—

By the common law of England, one who negligently set fire to anything on his own land, was liable for the destruction of the property of another person to which the fire extended, without any further fault on his part.¹ An act passed in 1707 enacted that no action should be maintained "against any person in whose house or chamber any fire shall accidentally begin," and this provision was extended, by an act passed in 1774, to fires accidentally originating in a stable, barn, or other out-building.² These English statutes, enacted before the

¹ *Beaulieu v. Finglam*, Year Book, 2 H. 4, f. 18, pl. 6, translated in 22 N. Y. 366.

² 6 Anne, c. 31, § 67; 14 Geo. III, c. 78, § 86. See *Tubervil v. Stamp* (1 Salk. 13), where the plaintiff recovered, and the court said: "For the fire in his field is his fire as well as that in his house; he made it, and must see it does no harm, and answer the damage if it does." And as to the different liability of lessee at will and lessee for years, see *Pantam v. Isham*, 1 Salk. 19. These two statutes are quoted and com-

mented upon in *Reed v. Penn. R. Co.*, 44 N. J. Law, 280; *Penn. Co. v. Whitlock*, 99 Ind. 16; *Lansing v. Stone*, 37 Barb. 15. In *Reed v. Penn. R. Co.*, *Reed, J.*, says: "The act of Anne was incorporated in the compilation made by Judge Paterson, and appears as the last section in the statute for the prevention of waste (Rev. p. 1236, 38). The act of Geo. III was never re-enacted in this state; and, in view of the fact of its omission from the compilation of statutes just alluded to, it never became part of the law of this state."

separation of the American colonies, and, therefore, incorporated into our common law, were formerly held to have relieved the owner of real property from liability for the spread of a fire beginning accidentally thereon, even though he was negligent in allowing it to begin.³ But these statutes are now construed as referring only to pure accidents, free from any culpable negligence.⁴ It seems to have been assumed by Parliament, in enacting these statutes, that the owner of land was bound at all hazards to prevent the escape of fire from his premises. The general rule in this country is that, where an accidental fire starts upon one's premises, he is not liable for the damage thereby caused to his neighbor, unless it started through his negligence,⁵ or he failed to use ordinary care and skill to

³ *Lansing v. Stone*, 37 Barb. 15.

⁴ *Webb v. Rome, etc. R. Co.*, 49 N. Y. 420; *Spaulding v. Chicago, etc. R. Co.*, 30 Wisc. 110. In *Vaughan v. Menlove* (3 Bing. N. C. 463; 4 Scott, 244), defendant was held liable for the consequences of the spontaneous combustion of his hay; he having stacked it close to plaintiff's cottages, and having been warned of its liability to take fire, and advised to take the rick down, to which he replied that "he would chance it." And though Lord Lyndhurst, in *Canterbury v. Attorney-General* (1 Phillips, 306), questioned the authority of this decision, on the ground that the statutes of Anne and George III were not referred to, its doctrine has been reaffirmed by the Queen's Bench, which held that the statutes applied only to fires purely accidental (*Filliter v. Phippard*, 11 Q. B. 347). The case there presented to the court for decision, however, was not one of accidental fire in any sense, but of a fire purposely lighted by the defendant, though spreading by accident beyond his land. See also *Barnard v. Poor*, 21 Pick. 378; *Maull v. Wilson*, 2 Harringt. 443.

⁵ *Lansing v. Stone*, 37 Barb. 15.

In *Reed v. Penn. R. Co.* (44 N. J. Law, 280), defendant's servants left in a room where oil was stored a stove rapidly growing red-hot, upon which was a can of oil, and around which was scattered inflammable waste. Held, that a verdict of negligence was warranted. In *Van Fleet v. N. Y. Central R. Co.*, ([Buff. Sup'or], 7 N. Y. Supp. 636), defendant's wooden shanty, erected close to plaintiff's building, contained a small iron stove in which was burned soft coal; oil cans, waste, and oil lamps were kept there. A fire broke out in the shanty from some unknown cause and was communicated to plaintiff's building. Held, a question for the jury, to say whether there was such negligence as to render defendant liable. See, also, *Cook v. Anderson*, 85 Ala. 99; 4 So. 713; *McCormack v. Sornberger*, 56 Ill. App. 496. Negligence will not be inferred from fact of explosion of oil stored on defendant's premises (*Cosulich v. Standard Oil Co.*, 122 N. Y. 118; 25 N. E. 259; *Standard Oil Co. v. Swan*, 89 Tenn. 434; 15 S. W. 1068; *Cook v. Anderson*, 85 Ala. 99; 4 So. 713; *Wright v. Chicago, etc. R. Co.*, 27 Ill. App. 200).

extinguish it, or failed to provide adequate means for doing so.⁶

§ 666. Liability for spread of fire. — A question of the liability of one who negligently kindles a fire upon his own land, for those unforeseen and extraordinary consequences of such fires, which do sometimes occur, is one of considerable difficulty, and furnishes the severest test of the doctrine of proximate cause. Whole towns and cities, notably in the case of Chicago in 1871, have been destroyed by fires which began through the negligence of some one person. Was that person legally liable for the destruction of the hundreds or thousands of houses which were burned through the extension of the fire which he negligently started? If any independent, intelligent cause intervened between the original act of negligence and the burning of any particular piece of property, the person originally negligent would not, it is conceded, be liable for that disaster. Thus, if one by negligence set fire to his own house, and thus to his neighbor's house, divided from his only by a wall, all agree that he would be liable for the damage done to his neighbor. But, if some boy, in a spirit of mischief, should seize a burning brand from the neighbor's house, and throw it into the next house, thus setting fire to that also, all agree that the person originally negligent would not be liable for the destruction of the third house thereby ensuing. If, however, a high wind should arise, which unexpectedly carried brands from the second house across a street 100 feet wide, setting fire to a row of houses there, and brands from these houses should in turn be carried by the wind, as they frequently were during the great fire at Chicago, to a distance of

⁶ In *McNally v. Colwell* (91 Mich. 527; 52 N. W. 70), the proprietor of a lumber mill was held bound to provide such means for extinguishing fires as an ordinarily prudent man would use, having due regard to the safety of his own property and that of his neighbors; and his negligence in that regard is a question for the jury. In *McCully v. Clarke*, (40 Pa. St. 399), defendant lawfully piled coal about six feet high against the wall of plaintiff's warehouse;

the coal took fire and burned constantly for about three weeks, at the end of which plaintiff's warehouse caught fire and was destroyed. Defendant used some means to extinguish the fire and had apparently succeeded, the evening before plaintiff's warehouse caught fire. Held, defendant was only bound to use ordinary care and skill and proper means, to extinguish the fire; and a verdict for defendant was sustained.

more than a quarter of a mile, setting fire to houses thus remote from the spot where the fire started, should a person responsible for the origin of the fire be responsible for all these remote and unexpected consequences? Courts of last resort in New York and Pennsylvania once held that one who by negligence kindled a fire which destroyed his own house, and which, by force of an unusually strong wind, spread through the air to houses at a considerable distance, which would not under ordinary circumstances be reached by such a fire, was not liable for the damage thus done.¹ But these decisions are certainly not sound law. The contrary rule is asserted by the Supreme Court of the United States,² by the English courts,³ and by the courts of last resort in all the other states, where the question has been squarely raised.⁴ And in New York, the original decision

¹ *Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. These decisions are confined closely to their own facts, in the states where they were rendered. Thus, where, through the negligence of the company, an oil car came into collision with a locomotive, and so set fire to cars attached to it, and to plaintiff's house, in front of which the cars stood, the company was held liable (*Oil Creek, etc. R. Co. v. Keighron*, 74 Pa. St. 316). The *Kerr* case is also distinguished in such a manner in *Pennsylvania R. Co. v. Hope* (80 Pa. St. 373) as to somewhat weaken its force as a precedent; and yet there is no doubt that it is still followed (see *Hoag v. Lake Shore, etc. R. Co.*, 85 Pa. St. 293; *Lehigh Val. R. Co. v. McKeen*, 90 Id. 122). In *Behling v. Southwest Penn. Pipe Lines* (160 Pa. St. 359; 28 Atl. 777), the alleged negligence consisted in defendants laying a pipe line near to plaintiff's house on the bank of a run. The oil in the pipes caught fire, and burned the house. Held, it was not the laying of the pipes, but the intervening agency (fire) which proximately caused the

injury, and as the action was predicated on negligence in laying the pipes, there was nothing to go to the jury.

² *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469; *Crandall v. Goodrich Transp. Co.*, 16 Fed. 75; *Missouri Pac. R. Co. v. Texas & Pac. R. Co.*, 31 Id. 526. Compare *Insurance Co. v. Tweed*, 7 Wall. 44.

³ *Smith v. Southwestern R. Co.*, L. R. 6 C. P. 14; see *Rylands v. Fletcher*, L. R. 3 H. L. 330.

⁴ So held in *California* (*Henry v. Southern Pacific R. Co.*, 50 Cal. 183; see *Flynn v. San Francisco, etc. R. Co.*, 40 Id. 14); in *Colorado* (*Denver, etc. R. Co. v. Morton*, 3 Colo. App. 155; 32 Pac. 345); in *Florida* (*Jacksonville, etc. R. Co. v. Peninsular Land Co.*, 27 Fla. 1,157; 9 So. 661); in *Georgia* (*East Tennessee, etc. R. Co. v. Hesters*, 90 Ga. 11; 15 S. E. 828; *Same v. Hall*, 90 Ga. 17; 16 S. E. 91; [two miles]); in *Illinois* (*Ill. Central R. Co. v. McClelland*, 42 Ill. 355, 360; *Fent v. Toledo, etc. R. Co.*, 59 Id. 349; *Chicago, etc. R. Co. v. Pennell*, 110 Id. 435; but compare *Toledo, etc. R. Co. v. Muthersbaugh*, 71 Ill. 572); in *Indiana* (*Louisville, etc. R.*

has been so limited, and its principle so undermined, that it is of no real authority.⁵ All the courts seem dis-

Co. v. Krimming, 87 Ind. 351; Chicago, etc. R. Co. v. Williams, 181 Id. 30; 30 N. E. 696). The Ryan and Kerr cases are declared by the Indiana courts to be "in conflict with the overwhelming weight of authority, and cannot be deemed true interpretations of the law" (Billman v. Indianapolis, etc. R. Co., 76 Ind. 166, 172). So in *Iowa* (Small v. Chicago, etc. R. Co., 55 Iowa, 582 [locomotive sparks set fire to an elevator 20 feet from the track; fire spread to plaintiff's elevator, 70 feet distant]; Fish v. Chicago, etc. R. Co., 81 Iowa, 280; 46 N. W. 998); in *Kansas* (Chicago, etc. R. Co. v. McBride, 54 Kans. 172; 37 Pac. 978 [fire spread ten miles from its origin]); in *Kentucky*, Cincinnati, etc. R. Co. v. Barker, 94 Ky. 71; 21 S. W. 347); in *Maryland* (Green Ridge R. Co. v. Brinkman, 64 Md. 52; 20 Atl. 1024 [fire carried a mile]); in *Massachusetts* (Higgins v. Dewey, 107 Mass. 494; Hart v. Western R. Co., 13 Metc. 99 [fire carried across street 60 feet wide]); in *Michigan* (Hoyt v. Jeffers, 30 Mich. 181; Webster v. Symes, Id. ; 66 N. W. 580); in *Minnesota* (Sibley v. Northern Pac. R. Co., 32 Minn. 526); in *New Jersey* (Delaware, etc. R. Co. v. Salmon, 39 N. J. Law, 300; Kuhn v. Jewett, 32 N. J. Eq. 647 [oil tanks burst, oil took fire and ran down embankment into a river, and thence to petitioner's buildings]); in *North Carolina* (Blue v. Aberdeen, etc. R. Co., 116 N. C. 955; 21 S. E. 299); in *North Dakota* (Smith v. Northern Pac. R. Co., 3 N. Dak. 17; 53 N. W. 173; Gram v. Northern Pac. R. Co., 1 N. Dak. 252; 46 N. W. 972); in *Ohio* (Adams v. Young, 44 Ohio St. 80 [fire communicated to building

200 feet distant]); in *South Dakota* (Kelsey v. Chicago, etc. R. Co., 1 S. Dak. 80; 45 N. W. 204 [fire carried by wind two miles]; Yankton Fire Ins. Co. v. Fremont, etc. R. Co., 7 S. Dak. 428; 64 N. W. 514 [three and a half miles]; Haugen v. Chicago, etc. R. Co., 3 S. Dak. 394; 53 N. W. 769); in *Texas* (Missouri, etc. R. v. Prickryl [Tex. Civ. App.], 26 S. W. 855; see Missouri Pac. R. Co. v. Cullers, 81 Tex. 382; 17 S. W. 19); in *Vermont* (Hoskison v. Central Vt. R. Co., 66 Vt. 618; 30 Atl. 24); in *Virginia* (Tyler v. Ricamore, 87 Va. 466; 12 S. E. 799); in *Wisconsin* (Atkinson v. Goodrich Tr. Co., 60 Wisc. 141; 18 N. W. 764; Beggs v. Chicago, etc. R. Co., 75 Wisc. 444; 44 N. W. 633; Marvin v. Chicago, etc. R. Co., 79 Wisc. 140; 47 N. W. 1123 [two and a half miles]).

⁵ See cases cited in note 3, § 30, *ante*; also Seeley v. N. Y. Central R. Co. 102 N. Y. 719; 7 N. E. 734. On the last occasion on which the doctrine of the Ryan case was mentioned, in the court which decided it (Frace v. N. Y., Lake Erie, etc. R. Co., 143 N. Y. 182; 38 N. E. 102), the court said: "The Ryan case should not be extended beyond the precise facts which appear therein. Even if correctly applied in that case, the principle ought not to be applied to other facts" (per Peckham, J.). In the Frace case, it was held that the question whether sparks from an engine were the proximate cause of the burning of an hotel which took fire from a barn which the sparks had set on fire was for the jury. One may profitably stop to contemplate the incalculable amount of property destroyed by the culpable

posed to put some limit to the liability of a negligent person under such circumstances; but they go no further in this direction than to hold that he is liable only for such extension of the fire negligently kindled by him as a prudent person would have regarded as reasonably possible under the state of wind and weather existing at the time of the fire.⁶ Thus, where the defendants negligently set fire to their own elevator, 125 feet high, and a gale then blowing carried the flames 538 feet in one direction, and 380 feet in another, the defendants were held liable for all the consequences.⁷ One by whom a fire is negligently started, which runs along a line of connected materials, such as dry grass or forest trees, is held liable by all the courts for the whole damage resulting therefrom, however distant.⁸ Expert evidence on the probability of fire extending

negligence of railroad companies, alone, during the thirty-one years which have elapsed since the decision of the Ryan case, in 1866, for which the losers have been either immediately denied any redress, or have been deterred from demanding any, because of the authority of this now discredited decision, which courts of first instance have felt bound to follow. Its doctrine has been applied in *Judd v. Cushing*, 50 Hun, 181; 2 N. Y. Supp. 836 (see note to this case in 22 Abb. N. C. 358); *Martin v. N. Y., Ontario, etc. R. Co.*, 62 Hun, 181; 16 N. Y. Supp. 499; *Reiper v. Nichols*, 31 Hun, 491; and other cases reported and unreported. See *Hine v. Cushing*, 53 Hun, 519; 6 N. Y. Supp. 850; *Cosulich v. Standard Oil Co.*, 55 N. Y. Superior, 394; rev'd, 122 N. Y. 118; 25 N. E. 259.

⁶ Where an engine set fire to the company's depot, and thence to plaintiff's hotel, held not to be necessary that the burning of the hotel should be so certain to result from the burning of the depot that a reasonable person could have foreseen that the hotel would burn. It is enough if it was a consequence so

natural and direct that a reasonable person might and naturally would see that it was liable to result from the burning of the depot (*Chicago, etc. R. Co. v. Pennell*, 110 Ill. 435). *S. P.*, *Frace v. N. Y., Lake Erie, etc. R. Co.*, 143 N. Y. 182; 38 N. E. 102; *Martin v. N. Y., Ontario, etc. R. Co.*, 62 Hun, 181; 16 N. Y. Supp. 499; *Martin v. N. Y. & New England R. Co.*, 62 Conn. 331; 25 Atl. 239. See an instructive opinion by Elliott, J., citing this section and reviewing many cases, in *Louisville, etc. R. Co. v. Nitsche*, 126 Ind. 229; 26 N. E. 51 [setting out a fire on peat beds, whence it spread].

⁷ *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469; see *Railroad Co. v. Richardson*, 91 Id. 471. Damage from a fire communicated to property ten miles from the railroad where it originated from sparks from a locomotive, held, not so remote, or the result of such a mere possibility, as to relieve defendant, the weather being dry and windy (*Chicago, etc. R. Co. v. McBride*, 54 Kans. 172; 37 Pac. 978).

⁸ *Webb v. Rome, etc. R. Co.*, 49 N. Y. 420; *Martin v. N. Y., Ontario, etc. R. Co.*, 62 Hun, 181; 16 N. Y.

in any particular case is almost always inadmissible.⁹ It is no defense, as matter of law, that the wind changed after a fire was negligently started and caused it to spread, because a person of ordinary prudence will anticipate such changes, as being common and likely to occur,¹⁰ and, moreover, the spreading of fire once set, especially in the open country, is naturally and reasonably to be expected.¹¹ In the case, however, of a fire

Supp. 499; *Eighmie v. Rome*, etc. R. Co., 57 Hun, 586; 10 N. Y. Supp. 600; *Annapolis, etc. R. Co. v. Gantt*, 39 Md. 115; *Philadelphia, etc. R. Co., v. Constable*, 39 Id. 149; *Kellogg v. Chicago, etc. R. Co.*, 26 Wisc. 223; *Louisville, etc. R. Co. v. Krinning*, 87 Ind. 351; *Indiana, etc. R. Co. v. Overman*, 110 Ind. 538; *Krippner v. Biebl*, 28 Minn. 139; *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373 [fire spread over two fields, and burned another fence and plaintiff's standing timber]; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122 [sparks from a locomotive set fire to leaves, logs, etc., and in about two hours the fire reached and burned plaintiff's lumber 300 feet distant]; *Clemens v. Hannibal, etc. R. Co.*, 53 Mo. 366 [fire spread forty or fifty yards across ground, covered with dry grass, and burned plaintiff's barn]; *Marvin v. Chicago, etc. R. Co.*, 79 Wisc. 140; 47 N. W. 1123 [two and a half miles]; *Burlington, etc. R. Co. v. Westover*, 4 Neb. 268 [fire spread a mile]; *Coates v. Missouri, etc. R. Co.*, 61 Mo. 38; *Atchison, etc. R. Co. v. Bales*, 16 Kans. 252; *Gulf, etc. R. v. Witte*, 68 Tex. 295; 4 S. W. 490. See cases cited under § 678, *post*.

⁹ In *Milwaukee, etc. R. Co. v. Kellogg* (94 U. S. 469), held, no error to refuse to allow insurance experts to testify for defendant that, owing to the distance of plaintiff's mill, the fire started by defendant would not be considered as an exposure of the mill. On this point, *Strong, J.*,

said: "The subject of proposed inquiry was a matter of common observation upon which the low or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not permitted to state their conclusions." To the same effect are *Higgins v. Dewey* (107 Mass. 494), and *Fraser v. Tupper* (29 Vt. 409); and see *Ferguson v. Hubbell* (97 N. Y. 507). The court took a different view and admitted expert testimony in *Krippner v. Biebl* (28 Minn. 139), where a witness who had actual knowledge of such conditions was allowed to testify how far a fire in stubble land would be liable to "jump" a fire-break under certain conditions of wind and vegetation.

¹⁰ *Northern Pac. R. Co. v. Lewis*, 51 Fed. 658; 2 C. C. A. 446; 7 U. S. App. 254; *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252; 46 N. W. 972. So held, where the fire smouldered and seemed to have gone out, but revived under a change of wind (*Kripper v. Biebl*, 28 Minn. 139; 9 N. W. 671; *Poeppers v. Missouri, etc. R. Co.*, 67 Mo. 715). It is error to instruct that if the wind was "unusual and extraordinary," defendant is liable, without explaining the meaning of the words "unusual and extraordinary," so as to present to the jury the question whether the wind could have been reasonably expected (*Blue v. Aberdeen, etc. R. Co.*, 116 N. C. 155; 21 S. E. 299).

¹¹ *Tyler v. Ricamore*, 87 Va. 466; 12 S. E. 799.

lawfully started on one's own land, which got beyond his control by reason of the wind suddenly rising to great violence, negligence will not be imputed to him for not anticipating it.¹² If the operation of a mill on a windy day endangers adjacent property by reason of the emission of sparks from its chimney, it is for the jury to say whether ordinary prudence did not require the shutting down of the mill until the wind should abate.¹³

§ 667. Proximate cause of injury from spread of fire.—

If some intervening, independent, and responsible human cause extended a fire beyond its natural consequences, the person originally in fault is not liable for such results.¹ Thus, if another person should wantonly cause a fire to spread beyond the limits which it would naturally have reached; or if, by the use of ordinary diligence, the person whose building first caught fire from that of the defendant could certainly have extinguished the flames on his own land, but omitted to do so;² or if, having attempted to extinguish the flames, and supposing he had succeeded, he negligently left them to revive, and they spread to other land,³ the defendant would not be liable for the final damage. But the mere co-operation of a third person with the defendant, in the act of negligence, is no excuse for him.⁴ Thus, if A. negligently sets fire to the premises of B., and B., for his own purposes, induces A. to

¹² *Sweeney v. Merrill*, 38 Kans. 216; 16 Pac. 454; *Marvin v. Chicago, etc. R. Co.*, 79 Wisc. 140; 47 N. W. 1123.

¹³ It is proper to charge that, if the operation of the mill endangered plaintiff's property to the extent that an ordinarily prudent man would have shut down such mill until the violence of the wind had abated, the failure of defendant to do so was negligence (*Webster v. Symes*, Mich. ; 66 N. W. 580).

¹ See cases cited under §§ 32-38, *ante*.

² See *Read v. Nichols*, 118 N. Y. 224; 23 N. E. 468.

³ In *Doggett v. Richmond, etc. R.*

Co. (78 N. C. 305), a fire negligently kindled by a locomotive, after being extinguished, in the judgment of those contending with it, broke out afresh and consumed plaintiff's fence, about three-fourths of a mile distant from the track. Held, that the injury was too remote to entitle plaintiff to recover. See *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382; 17 S. W. 19.

⁴ In *Atchison v. Goodrich Tr. Co.* (60 Wisc. 141), held to be no defense that a planing mill, where the fire started, would not have caught fire but for the negligence of its owner in allowing shavings to accumulate on the dock near it. *S. P. Johnson v. Chicago, etc. R. Co.*, 31 Minn. 57.

abstain from extinguishing the fire, which then extends to the premises of C., A. is liable to C. for the damage ensuing;⁵ though it would doubtless be held otherwise, if B., having a right to prohibit A. from entering B.'s land to extinguish the fire, had actually done so. Where two fires, for only one of which defendant is responsible, run together, and, thus mingled, consume plaintiff's property, the defendant is nevertheless liable for the whole damage,⁶ provided the fire negligently kindled by him was directly connected with the loss.⁷ Though the fire which first reached and destroyed the property was a "back fire," set to protect it against a prairie fire which defendant had negligently set and permitted to escape, the latter is nevertheless liable for the destruction, if it would have been effected by the original fire, notwithstanding the second fire.⁸

§ 668. **Fire purposely kindled.** — One who purposely kindles a fire upon his own premises must certainly use ordinary care to confine it within his own premises, and so to avoid injury thereby to the property of another.¹ And it seems that,

⁵ *Simmonds v. N. Y. & New England R. Co.*, 52 Conn. 264.

⁶ *McClellan v. St. Paul, etc. R. Co.*, 58 Minn. 104; 59 N. W. 978; *Thoburn v. Campbell*, 80 Iowa, 338; 45 N. W. 769. Compare *Pielke v. Chicago, etc. R. Co.*, 5 Dak. 414; 41 N. W. 669.

⁷ A fire originated through defendant's negligence two and one-half miles north of plaintiff's land, and several days afterwards his property was burned. In the meantime, other fires had been started north and east of his land to prevent the first fire's spreading. Held that, to render defendant liable, the first fire must be directly connected with plaintiff's loss (*Marvin v. Chicago, etc. R. Co.*, 79 Wisc. 140; 47 N. W. 1123). But compare case in next note.

⁸ *McKenna v. Baessler*, 86 Iowa, 197; 53 N. W. 103.

¹ *Filliter v. Phippard*, 11 Q. B. 347; *Hewey v. Nourse*, 54 Me. 256. In

Jespersion v. Phillips (46 Minn. 147; 48 N. W. 770), defendant, to protect his property from a fire raging near, started a back fire. The day was windy, and in the direction in which the wind was blowing, and extending to plaintiff's farm, was a marsh covered with tall, dry grass. It did not appear that any care was taken by defendant to prevent the fire from injuring others. Held, sufficient to sustain a verdict for plaintiff. S. P., *Richards v. Schleusener*, 41 Minn. 49; 42 N. W. 599. There are many cases of negligence on the part of railroad companies in setting a fire for the purpose of clearing its right of way. See *Gulf, etc. R. Co. v. Cusenberry*, 86 Tex. 525; 26 S. W. 43; *Dobbyn v. Northern Pac. R. Co.*, 50 Minn. 516; 52 N. W. 924; *Gould v. Northern Pac. R. Co.*, 50 Minn. 516; 52 N. W. 924; see cases cited under § 678, *post*. In *Louisville, etc. R.*

by the common law, every man was absolutely bound to keep fire, intentionally originated by him, within the limits of his own land, and was liable for any injury done by its escape, though he were entirely free from negligence.² But this rule is certainly not law in any part of the United States.³ In any case in which one makes a fire on his own land, for a lawful purpose, and the fire spreads upon other land, the person complaining thereof must affirmatively prove negligence, of which the fire itself is no evidence.⁴ It would, unquestionably, be negligence to set fire to a building immediately adjoining the house of another person, or to start a fire in any place which a person of ordinary capacity could see was in dangerous proximity to another's property.⁵ One who uses a steam engine on his own land ought to use the ordinary means for confining sparks, especially if he burns wood; and he is liable if, for want of such precautions, the sparks set fire to a neighbor's property.⁶

Co. v. Nitsche (126 Ind. 229; 26 N. E. 51), it was held to be something more than negligence to start a fire on a bed of peat at a season of long continued drought, it being reasonably certain that the fire would spread over continuous peat beds. To same effect, *Chicago, etc. R. Co. v. Williams*, 131 Ind. 30; 30 N. E. 696; *Chicago, etc. R. v. Barnes*, 2 Ind. App. 213; 28 N. E. 328.

² *Beaulieu v. Finglam*, 2 H. 4, f. 18, pl. 6; to same effect, *Fletcher v. Rylands*, L. R. 1 Exch. 265; 3 H. L. 330; *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733; *Furlong v. Carroll*, 7 Ont. App. 145.

³ *Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210; *Losee v. Buchanan*, 51 N. Y. 476; and cases in next note.

⁴ *Tourtellott v. Rosebrook*, 11 Metc. 460; *Bachelor v. Heagan*, 18 Me. 32; *Sturges v. Robbins*, 62 Id. 289; *McGibbon v. Baxter*, 51 Hun, 587; 4 N. Y. Supp. 382; *Loeber v. Roberts*, 60 N. Y. Superior, 202; 17 N. Y. Supp. 378; *Sweeney v. Merrill*, 38 Kans. 216; 16 Pac. 454; *Russell v. Reagan*, 34 Mo. App. 242 [charcoal

burner]; *Gregory v. Layton*, 36 S. C. 93; 15 S. E. 352.

⁵ In *Townley v. Fall Brook Coal Co.* (59 Hun, 616; 12 N. Y. Supp. 649), defendant set fire to eight or ten piles of old cross-ties along its railroad in front of, and six yards distant from, plaintiff's mill. On a conflict of evidence as to whether the fire was communicated to the mill, a verdict for plaintiff was sustained. *S. P., Garrett v. Freeman*, 5 Jones Law, 78. The liability depends upon whether burning the rubbish was, under the circumstances, dangerous to the property of adjoining proprietors, even if carefully performed (*St. Louis, etc. R. Co. v. Yonley*, 53 Ark. 503; 14 S. W. 800).

⁶ *Teall v. Barton*, 40 Barb. 137. Defendant's steam saw-mill was situated in a small town, and surrounded with wooden buildings, and its chimney had no arrester, netting or valve to prevent the escape of sparks, and the sparks set fire to a hotel 230 feet distant; a verdict for plaintiff was sustained (*Hoyt v. Jeffers*, 30 Mich.

He is also bound to use ordinary care to keep his own grounds in such condition that any fire set thereon by the engine shall not be communicated thence to adjacent premises.⁷

§ 669. Fire kindled to clear land. — The owner or occupant of land has a right to burn the fallow and wood thereon, in accordance with the custom of the country, for the purpose of bringing the land into cultivation, and is not liable for injuries caused to his neighbors thereby, without proof of some other act or default, or some other circumstance making the act itself negligent.¹ He must, however, in doing so, use ordinary care to avoid spreading the fire upon the land of others;² and it is at least an open question, in some states, whether he is not bound to prove affirmatively that he took such care;³ though it is generally held that the burden of proof in this respect rests upon the plaintiff.⁴ The mere fact that the person thus

181). *s. p.*, Webster v. Symes, *Id.* ; 66 N. W. 580.

¹ Gillingham v. Christen, 55 Ill. App. 17 [steam thrashing machine]; McClelland v. Scroggin, 48 Neb. 141; 66 N. W. 1123 [same]. One using a thrashing machine is not compelled to use the safest appliances for arresting sparks, but only reasonable care to furnish good machinery, combining the greatest safety with practical use (*Holman v. Boston Land Co.*, 20 Colo. 7; 36 Pac. 797 [action against operator of machine]).

¹ Hays v. Miller, 6 Hun, 320; Calkins v. Barger, 44 Barb. 424; Stuart v. Hawley, 22 *Id.* 619; Clark v. Foot, 8 Johns. 421; Fahn v. Reichart, 8 Wisc. 255; Hanlon v. Ingram, 3 Iowa, 81; Averitt v. Murrell, 4 Jones Law, 323; Miller v. Martin, 16 Mo. 508; DeFrance v. Spencer, 2 Greene [Iowa], 462. In almost all of these cases the defendant set fire to wood or stubble upon his land, in a dry season, and the wind blew it over to the plaintiff's premises. This was held not sufficient to establish negligence. Evidence as to the

weather at the time the fire was started is competent to show the degree of care that should have been exercised (*Bolton v. Calkins*, 102 Mich. 69; 60 N. W. 297).

² Hanlon v. Ingram, 1 Iowa, 108; Dewey v. Leonard, 14 Minn. 153; Needham v. King, 95 Mich. 303; 54 N. W. 891; Dunleavy v. Stockwell, 45 Ill. App. 230; Kahle v. Hobein, 30 Mo. App. 472; Russell v. Reagan, 34 *Id.* 242; Lewis v. Schultz, Iowa, ; 67 N. W. 266; Powers v. Craig, 22 Neb. 621; 35 N. W. 888; Garnier v. Porter, 90 Cal. 105; 27 Pac. 55; Krippner v. Biebl, 28 Minn. 139; Brummit v. Furness, 1 Ind. App. 401; 27 N. E. 656.

³ In *Tubervil v. Stamp* (1 Salk. 13), it was held that the burden of proof lay upon the defendant to show that he had not been negligent in his care of the fire lit by him. See § 675, *post*.

⁴ *Tourtellot v. Rosebrook*, 11 Metc. 460; *Higgins v. Dewey*, 107 Mass. 494; *Batchelder v. Heagan*, 18 Me. 32; *Stuart v. Hawley*, 22 Barb. 619; *Catron v. Nichols*, 81 Mo. 80.

making a fire did not keep a constant watch over it does not tend to prove negligence.⁵ Though it would be gross negligence to set fire to one's own wood, while combustible property of another person was lawfully on the premises, without giving the latter an opportunity to remove it,⁶ yet if, after being distinctly warned of what is about to happen, he does not within a reasonable time remove his property (unless, of course, he has a right to keep it there against the land-owner's will), the land-owner may set his own wood on fire, without being liable for any consequent injury to the latter's property.⁷

§ 670. Firing other land. — One who, either wrongfully or by want of ordinary care, sets fire to land which does not belong to him, is responsible for all the proximate consequences of his act, not only to the owner of the land upon which the fire begins, and to the owner of property upon that land,¹ but also to the owner of any other property which the fire may reach in its spread. Therefore, one who negligently starts a fire upon a prairie, or other wild lands, is liable for all property destroyed by the spread of the flames.² It is, however, often necessary to kindle a fire upon wild lands; and, therefore, the fact that such a fire was willfully kindled by a defendant is not absolutely conclusive of his liability. It places upon him, no doubt, the burden of proving that he had good cause for firing the land; but, if this is proved, he is not liable for damage done, unless he failed to use ordinary care to prevent the spread of the fire.³

⁵ In *Calkins v. Barger* (44 Barb. 424), defendant set fire to some log-heaps on his land, and left it. During his absence the wind rose, and blew the fire over some distance to defendant's barn, which took fire. Held, that if defendant had no reason to apprehend any sudden change in the weather and the rising of the wind when he left home, he should not be held responsible for it; certainly not, without some proof that his presence there might have prevented the injury. See other cases on this point cited in note 10, § 666, *ante*; also *Ferguson v. Hubbell* (97

N. Y. 507), where the jury seemed to think that defendant was not guilty of negligence in setting fire to his fallow when the land was dry and the wind blowing strong towards plaintiff's buildings.

⁶ *Jordan v. Wyatt*, 4 Gratt. 151.

⁷ *Bennett v. Scutt*, 18 Barb. 347.

¹ But he may justify himself by showing that he lit the fire at a place and in a manner approved by plaintiff (*Jordan v. Lassiter*, 6 Jones Law, 130).

² *Finley v. Langston*, 12 Mo. 120

³ *Bizzell v. Booker*, 16 Ark. 308 [defendant built a fire in a hunting

§ 671. **Statutory liability.** — This subject is regulated by statute, in some states. Thus, in Connecticut,¹ one who sets fire on any land is made liable by statute for all the consequences of its spreading in any way upon the land of another person. This statute does not apply to the case of a fire started by a person upon another's land, and not extending further.² Such a case is governed by the common law. By a statute of North Carolina, one who willfully fires woods upon his land is liable to an adjoining owner for injuries caused by such fire, unless he has given the latter written notice of his intention to do so at least two days before.³ In Illinois,⁴ on account of the devastating effects of fires upon the prairies, all persons are absolutely prohibited by statute from firing woods or anything upon the ground, except between March and November, and then only for the single purpose of protecting themselves from prairie fires. Under this statute, the burden is upon the defendant to prove that his fire was within the exceptions of the statute, and that he used every reasonable precaution to prevent injury to others.⁵ In Missouri, any one willfully setting fire to any marsh, woods, or prairie, is liable for the consequences, without any negligence being shown.⁶ In Iowa, the liability of a person setting fires, between September and May, is absolute, regardless of the question of negligence; although, previous to the statute of 1862, ordinary caution and honest motives in setting fire to a prairie and due diligence to prevent its spreading formed a good defense.⁷ The Kansas statute makes a person setting fires in woods or prairie camp and did not extinguish it when he left].

¹ Conn. Rev. Stat. [1866], 84, § 365, as construed in *Ayer v. Starkey*, 30 Conn. 304.

² *Grannis v. Cummings*, 25 Conn. 165. There held that a fire started by A., upon certain land of B., which A. had a license to use for a specific purpose only, was not within the statute, though the fire extended to other land of B.

³ N. C. Rev. Code [1855], 115, ch. 16, § 1). But this notice may be waived by the adjoining owner (*Roberson v. Kirby*, 7 Jones Law, 477).

This statute does not apply to a firing, of log heaps or trash collected on the land, but only to the firing of woods actually growing on the soil (*Averitt v. Murrell*, 4 Jones Law, 322).

⁴ Ill. Gen. Stat. [1858], 402, § 158.

⁵ *Johnson v. Barber*, 5 Gilm. 425; *Burton v. McClellan*, 2 Scam. 434.

⁶ 1 Wag. Stat. 638; *Finley v. Langston*, 12 Mo. 120.

⁷ *Conn v. May*, 36 Iowa, 241; *Brunell v. Hopkins*, 43 Id. 429; see *De France v. Spencer*, 2 Greene, 462; *Lewis v. Schultz*, Iowa, ; 67 N. W. 266.

liable for all the damage, but excepts the case of one who sets a fire against fire so as to protect his own property.⁸ In New York and California, "every person negligently setting fire to his own woods, or negligently suffering a fire, kindled upon his own wood or fallow land, to extend beyond his own land," forfeits "treble damages to the party injured thereby."⁹

§ 672. Fire communicated from locomotives. — The rapid extension of railroads, with the consequent numerous accidents resulting from the escape of sparks and cinders from their engines, has caused actions founded upon such accidents to form by far the greater part of those claims for loss by fire which come before the courts. It is held in England that the owner of a railroad, not expressly authorized to use steam or other power involving the use of fire, is liable for the escape of sparks from the engines, irrespective of negligence.¹ This is not, we think, the law in America, for reasons already stated. But the practical result may not be very different; for, in the absence of special legislative authority, we conceive that fire could not be carried about, as it must be on a railroad, without continually incurring a just imputation of negligence. The

⁸ Comp. Stat. §§ 6642, 6643, 6644. And this statute has no application where a prairie fire is set by a locomotive skillfully constructed and carefully operated (Missouri, etc. R. Co. v. Davidson, 14 Kans. 349).

⁹ 1 Rev. Stat. 696, § 1; 3 R. S. 7th ed. 2086. This being a penal statute, verdict for defendant against evidence will not be set aside (*Lawyer v. Smith*, 1 Den. 207). Under the *California* statute (Pol. Code, § 3344), providing that every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, shall be liable in treble damages, negligence will not be presumed because the fire started on defendant's land (*Galvin v. Gualala Mill Co.*, 98 Cal. 268; 33 Pac. 93). A *Florida* statute (L., c. 3141, § 1) requires persons, before setting fire to wild

forests, to notify "all" persons living within one mile of the place intended to be fired. It is a compliance, as to plaintiff, if he, though the only one, was notified (*Saussy v. South Florida R. Co.*, 22 Fla. 327).

¹ *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733. As to what language will confer this power, see *Moshier v. Utica, etc. R. Co.*, 8 Barb. 427; *Bishop v. North*, 3 Railw. Cas. 459; *State v. Tupper*, Dudl. [S. C.], 135. Defendant, who owned and operated a logging railroad, under no charter, was held to be liable for setting fire to plaintiff's mill, by sparks from an engine, though plaintiff had allowed sawdust and other rubbish to accumulate all around the mill, and had used it to fill up low places near the track (*Kendrick v. Towel*, 60 Mich. 363; 27 N. W. 567).

question is, however, of no practical importance in this country. A railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam, and is not liable for injuries by sparks, smoke, or coals escaping from its locomotives, if it has adopted every known reasonable precaution against such accidents;² though it will be liable therefor, if such precautions are not adopted.³ The most that can be required of it, in the matter of providing its locomotives with suitable spark-arresters, and of keeping its right of way free from combustible materials, is the exercise of ordinary care, skill and diligence to that end.⁴ If, notwith-

² *Rood v. N. Y. & Erie R. Co.*, 18 Barb. 80; *Vaughan v. Taff Vale R. Co.*, 5 Hurlst. & N. 679; rev'g s. c., 3 Id. 743; *Phil., etc. R. Co. v. Yeiser*, 8 Pa. St. 366; *Frankford, etc. Turnp. Co. v. Phil. & Trenton R. Co.*, 54 Id. 345; *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; *Sheldon v. Hudson Riv. R. Co.* 14 N. Y. 218; *Baltimore, etc. R. Co. v. Woodruff*, 4 Md. 242; *McCready v. South Carolina R. Co.*, 2 Strobb. Law, 356; *Illinois Central R. Co. v. Mills*, 42 Ill. 407; *Indiana, etc. R. Co. v. Craig*, 14 Ill. App. 407; *Ohio, etc. R. Co. v. McCartney*, 121 Ind. 385; 23 N. E. 258 [pleading]; *Cantlon v. Eastern R. Co.*, 45 Minn. 481; 48 N. W. 22 [liability of lessee of road]; *Knight v. Chicago, etc. R. Co.*, 81 Iowa, 310; 46 N. W. 1112; *Bernard v. Richmond, etc. R. Co.*, 85 Va. 792; 8 S. E. 785; *Gulf, etc. R. Co. v. Benson*, 69 Tex. 407; 5 S. W. 822; *Columbia, etc. R. Co. v. Farrington*, 1 Wash. St. 202; 23 Pac. 413.

³ *Fremantle v. London, etc. R. Co.*, 10 C. B. N. S. 89; *Huyett v. Phil., etc. R. Co.*, 23 Pa. St. 373; *Lackawanna, etc. R. Co. v. Doak*, 52 Id. 379; *Bass v. Chicago, etc. R. Co.*, 28 Ill. 9; *St. Louis, etc. R. Co. v. Gilham*, 39 Id. 455; *Illinois Cent. R. Co. v. McClelland*, 42 Id. 355; *Jackson v. Chicago, etc. R. Co.*, 31 Iowa,

176; *Mississippi Ins. Co. v. Louisville, etc. R. Co.*, 70 Miss. 119; 12 So. 156. In *Bedell v. Long Island R. Co.* (44 N. Y. 367), a screen formerly used to cover the smoke-pipe had been removed, and while so removed large burning cinders, which could not have passed the screen, were thrown to considerable distances. Held negligence, notwithstanding that screens upon such engines as the one in question were not commonly used. A liability may be established by proof that a defective spark-arrester was used, and after a certain appliance has been identified as that in use, an expert witness may state that cinders shown to him could not be emitted through such an appliance if an engine were "properly constructed" (*Brush v. Long Island R. Co.*, 10 N. Y. App. Div. 535; 42 N. Y. Supp. 103).

⁴ *Eddy v. Lafayette*, 4 U. S. App. 247, 1 C. C. A. 441; 49 Fed. 807. The company is bound to exercise such care to prevent the spread of the fire and resulting damage as a prudent man would deem proper under the circumstances (*Missouri Pac. R. Co. v. Platzer*, 73 Tex. 117; 11 S. W. 160). The care should be commensurate with the danger, but, whether the care so required is slight or extreme, it is "ordinary care"

standing the exercise of such care, sparks escape from a locomotive and set fire to adjacent property, the damage is an incident of the operation of railroads, and must be borne by the owner of the property.⁵ The same rule of liability applies, of course, to cases of fire communicated from steam engines, other than locomotives.⁶

§ 673. Duty to use approved appliances on locomotives.—

The requirement of the use of the best appliances does not mean that the company will be liable, on simple proof that an invention was in existence, by the use of which the injury might have been prevented. It must appear that, before the time of the injury, the invention had come into common use, and had been approved by experience;¹ and the company will

(Cronk v. Chicago, etc. R. Co., 3 S. Dak. 93; 52 N. W. 420). The failure of a railroad company to employ the best known appliances to prevent injury to property by fire is want of ordinary care (Watt v. Nevada Cent. R. Co., Nev. ; 44 Pac. 423). Ordinary care may therefore require the exercise of the "utmost care" in running through buildings constructed of wood, and exposed to fire from the locomotive, especially if at the time the wind is blowing from the engine towards the buildings (Jacksonville, etc. R. Co. v. Peninsular Land Co., 27 Fla. 1157; 9 So. 661). A charge that "a higher degree of care is required when the wind is high than when it is calm, and where combustible matter is very dry than when it is wet," held, erroneous (Johnson v. Northern Pac. R. Co., 1 N. Dak. 354; 48 N. W. 227).

⁵ White v. Chicago, etc. R. Co., 1 S. Dak. 326; 47 N. W. 146; Martin v. Texas, etc. R. Co., 87 Tex. 117; 26 S. W. 1052. If defendant was using the spark-arrester in common use, at the time, no negligence could be imputed to defendant, it appearing that the emission of sparks on such a steep grade as the one in question

was inevitable (Flinn v. N. Y. Central R. Co., 142 N. Y. 11; 36 N. E. 1046).

⁶ Anderson v. Cape Fear Steamboat Co., 64 N. C. 399 [steamboat; no spark-catcher]; Read v. Morse, 34 Wisc. 315 [same]; Cheboygan Lumber Co. v. Delta Tr. Co., 100 Mich. 16; 58 N. W. 630 [steamboat; no fire-screen]; Ireland v. Cincinnati, etc. R. Co., 79 Mich. 163; 44 N. W. 426 [stationary boiler and smoke-stack]; Day v. Akeley Lumber Co., 54 Minn. 522; 56 N. W. 243 [factory]; Hauch Hernandez, 41 La. Ann. 992; 6 So. 783 [porcelain factory kiln]; Holman v. Boston Land Co., 8 Colo. App. 282; 45 Pac. 519 [steam thrashing machine]; Peers v. Elliott, 21 Can. S. C. 19 [engine attached to hay-press]. See also Perry v. Smith, 156 Mass. 340; 31 N. E. 9; Rajnowski v. Detroit, etc. R. Co., 74 Mich. 15, 20; 41 N. W. 847, 849; Cowley v. Colwell, 91 Mich. 537; 52 N. W. 73; Gregory v. Layton, 36 S. C. 93; 15 S. E. 352.

¹ Frankford, etc. Turnp. Co. v. Phil. & Trenton R. Co., 54 Pa. St. 345; Flinn v. N. Y. Central R. Co., 142 N. Y. 11; 36 N. E. 1046; see Steinweg v. Erie R. Co., 43 N. Y.

not be liable for an error of judgment in using an invention so approved, in preference to a better one also in common use;² nor for taking a reasonable time to supply *all* its locomotives with improved appliances.³ On uncontradicted evidence that the company used a spark-arrester as good as any known, the question of its negligence in using it ought not to be submitted to the jury.⁴ The use of wood in an engine intended for burn-

123; *Lafflin v. Buffalo, etc. R. Co.*, 106 N. Y. 136; 12 N. E. 599; *Burke v. Witherbee*, 98 N. Y. 562. A railroad company is bound to adopt and use only such appliances as, in the progress of science and improvement, have been shown by experience to be the best, and which are generally known (*Hagan v. Chicago, etc. R. Co.*, 86 Mich. 615; 49 N. W. 509). *s. P.*, *Chicago, etc. R. Co. v. Hunt*, 24 Ill. App. 644; *Chicago, etc. R. Co. v. Goyette*, 32 Id. 574; *aff'd*, 133 Ill. 21; 24 N. E. 549; *Metzgar v. Chicago, etc. R. Co.*, 76 Iowa, 387; 41 N. W. 49; *Jacksonville, etc. R. Co. v. Peninsular Land Co.* 27, Fla. 1, 157; 9 So. 661; *Rost v. Missouri Pac. R. Co.*, 76 Tex. 168; 12 S. W. 1131; *Missouri Pac. R. Co. v. Bartlett*, 81 Tex. 42; 16 S. W. 638). See *White v. N. Y., Chicago, etc. R. Co.*, 142 Ind. 648; 42 N. E. 456. A charge that the company is bound "to use the best known appliances that mechanical skill and ingenuity have been able to devise and construct to prevent the escape of sparks from its engines," held too broad (*Toledo, etc. R. Co. v. Corn*, 71 Ill. 493). See §§ 11, 43, 45, 410, 497, *ante*.

² *Hoff v. West Jersey R. Co.*, 45 N. J. Law, 201; *Gowen v. Glaser* [Pa.], 10 Atl. 417. On a claim that a new kind of spark-arrester has come into general use, plaintiff must show that it is more effectual for the purpose than the one used (*Babcock v. Fitchburg R. Co.*, 140 N. Y. 308; 35 N. E. 596). In *Menomonee River Co.*

v. Milwaukee, etc. R. Co. (91 Wisc. 447; 65 N. W. 176), the evidence showed that both short and extension front locomotives were in general use, but showed no decided superiority of one over the other. Held that, though the jury were convinced that one was the better engine, the company could not be held negligent in using the other. To similar effect, *Hoy v. Chicago, etc. R. Co.* 46 Minn. 269; 48 N. W. 1117. The fact that three different railroads named used the same kind of spark-arresters as defendant does not prove that such arresters are in general use (*Lake Side, etc. R. Co. v. Kelly*, 10 Ohio C. C. 322).

³ A company is not bound to introduce a new appliance which it is claimed will reduce the escape of sparks, but is entitled to a reasonable time for trial and experiment and to make the necessary changes. Four years for this purpose, and to supply all of its 1,000 engines, is not unreasonably long (*Flinn v. N. Y. Central R. Co.*, 142 N. Y. 11; 36 N. E. 1046).

⁴ *Frace v. N. Y., Lake Erie, etc. R. Co.*, 143 N. Y. 182; 38 N. E. 102; *Wheeler v. N. Y. Central R. Co.*, 67 Hun, 639; 22 N. Y. Supp. 561; *Menomonee River Co. v. Milwaukee, etc. R. Co.*, 91 Wisc. 447; 65 N. W. 176; *N. Y., Chicago, etc. R. Co. v. Baltz*, 141 Ind. 661; 36 N. E. 414; *Edrington v. Louisville, etc. R. Co.*, 41 La. Ann. 96; 6 So. 19. See *Hoy v. Chicago, etc. R. Co.* (46 Minn. 269; 48 N. W.

ing coal is evidence of negligence; because the meshes of the wire netting, used to prevent the escape of sparks, are made larger where coal only is intended to be used.⁵ A railroad company is not bound to use the best fuel that can be obtained, in its engines, and is not liable for using an inferior fuel, unless known to be of a dangerous character.⁶

§ 674. Other neglect than want of approved appliances.—

Even though all needful appliances are used for the retention of sparks, the company will still be liable if sparks escape by overcrowding the engine,¹ or if fire catches or spreads through any other neglect of due care,² such as leaving heaps of dry grass beside the track, when it was known that sparks could not be kept from escaping.³ The company is not bound to keep

1117), where the question was held to be one for the jury.

⁵ *Chicago, etc. R. Co. v. Quaintance*, 58 Ill. 389; *Chicago, etc. R. Co. v. Ostrander*, 116 Ind. 259; 19 N. E. 110; *St. Joseph, etc. R. Co. v. Chase*, 11 Kans. 47.

⁶ *Collins v. N. Y. Central R. Co.*, 5 Hun, 499.

¹ *Toledo, etc. R. Co. v. Pindar*, 53 Ill. 447; *Atchison, etc. R. Co. v. Huitt* [Kans. App.], 41 Pac. 1051. Evidence that the grade of the road at the place of the fire was steep, and that engines drawing trains up such grade are obliged to labor hard, and, on account of such labor, emit more sparks, is material (*Frier v. Delaware, etc. Canal Co.*, 86 Hun, 464; 33 N. Y. Supp. 836; *Frace v. N. Y., Lake Erie, etc. R. Co.*, 143 N. Y. 182; 38 N. E. 102; rev'g 68 Hun, 325; 22 N. Y. Supp. 958). The fire was set outside the right of way, while a strong wind was blowing, and while the locomotive was working at its full capacity to get a train over a grade. Held, a verdict for plaintiff was justified, since the jury could either find that the locomotive was defective, or that it was negligently

operated (*Hockstedler v. Dubuque, etc. R. Co.*, 88 Iowa, 236; 55 N. W. 74).

² Competent and careful employees operating the most approved machines may nevertheless fail in particular instances to exercise their skill in a careful manner (*Wilson v. Atlanta, etc. R. Co.*, 16 S. C. 587). The engine having been shown to have the best kind of spark-arrester, the court will not presume defendant negligent because the engine was old, and imperfect as to its capacity for generating steam (*Wheeler v. N. Y. Central R. Co.*, 67 Hun, 639; 22 N. Y. Supp. 561).

³ Evidence that there was combustible material on the right of way is admissible as bearing upon the degree of care necessary in operating the locomotive (*Cantlon v. Eastern R. Co.*, 45 Minn. 481; 48 N. W. 22). In *Brighthope R. Co. v. Rogers* (76 Va. 443), the court said: "If it be conceded, as claimed by the defendants, that their locomotive was of the most approved construction, and their spark-catcher was the same as used by the leading railroads of the country, the fact was nevertheless established that this same engine had

watchmen at every point where fire is possible;⁴ but, when its servants become aware that a fire has been started by its engines, etc., it is their duty to make the same efforts to extinguish it that they would if their own property was endangered.⁵ And, therefore, it is the duty of the conductor of a train not carrying passengers, nor pressed for time, to stop, when the train has started a fire, and to extinguish it.⁶ A peculiar degree of caution must be used in guarding the fire of a locomotive running through a town or village, and especially so where wooden buildings stand near the track. Under such circumstances, a railroad company is not excused by evidence of such vigilance as would be sufficient in passing through an open country.⁷

on several occasions set fire not only to buildings but to fields and forests and combustible matter on and along their line of road. The testimony of a dozen witnesses could not lessen the force of this evidence." For cases of fires set to combustibles on right of way, see § 678, *post*.

⁴Indianapolis, etc. R. Co. v. Paramore, 31 Ind. 143; Baltimore, etc. R. Co. v. Shipley, 39 Md. 251; Tribette v. Illinois Cent. R. Co., 71 Miss. 212; 13 So. 899.

⁵In Ball v. Grand Trunk R. Co. (16 U. Can. [C. P.], 252), following Vaughan v. Taff Vale R. Co. (5 H. & N. 679), the company was held liable because, when the fire was seen to be spreading to plaintiff's land, no exertion was made to extinguish it while it was still under control. A part of the negligence in Erd v. Chicago, etc. R. Co. (41 Wisc. 65), was the failure of the company to extinguish a fire which the employees saw spreading after the train stopped. In Clune v. Milwaukee, etc. R. Co. (75 Wisc. 532; 44 N. W. 843), a verdict against the company for such failure was sustained. And see Rost v. Missouri Pac. R. Co., 76 Tex. 168; 12 S. W. 1131. A tar-car

standing on a sidetrack took fire from sparks thrown by defendant's locomotive, and the fire was communicated to plaintiff's oil tank thirty-six feet from the car. The car was not moved after catching fire, although by moving it a short distance the burning of the tank would have been avoided. Held, whether defendant was negligent in not moving the car was for jury (Confer v. N. Y., Lake Erie, etc. R. Co., 146 Pa. St. 31; 23 Atl. 202). *s. p.*, Henry v. Cleveland, etc. R. Co., 67 Fed. 426 [oil in tank cars took fire in a collision; two hours' delay in detaching burning cars from rest of train, held negligence].

⁶Rolke v. Chicago, etc. R. Co., 26 Wisc. 537; Brighthope R. Co. v. Rogers, 76 Va. 443.

⁷Fero v. Buffalo, etc. R. Co., 22 N. Y. 209; Great Western R. Co. v. Haworth, 39 Ill. 346; Jacksonville, etc. R. Co. v. Peninsular Land Co., 27 Fla. 1, 157; 9 So. 661; N. Y., Lake Erie, etc. R. Co. v. Middlecoff, 150 Ill. 27; 37 N. E. 660; Inman v. Elberton R. Co., 90 Ga. 663; 16 S. E. 958; Louisville, etc. R. Co. v. Miller, 109 Ala. 500; 19 So. 989.

§ 675. **Evidence of origin of fire.** — In an action for damages upon injuries caused by sparks, etc., from a locomotive, the plaintiff must not only prove that the fire *might* have proceeded from the defendant's locomotive, but must show, by reasonable affirmative evidence, that it did so originate.¹ It is not necessary, however, to prove this beyond a reasonable doubt. Evidence showing that the engine emitted sparks in size and number sufficient to account for the fire, and flying near the building or field which actually caught fire, and that the fire was discovered very soon afterwards, no other cause being known, is sufficient to go to the jury on this point.²

¹ Sheldon v. Hudson River R. Co., 29 Barb. 226; Van Nostrand v. N. Y., Lake Erie, etc. R. Co., 78 Hun, 549; 29 N. Y. Supp. 635; Frier v. Delaware, etc. Canal Co., 86 Hun, 464; 33 N. Y. Supp. 886; Brown v. Buffalo, etc. R. Co., 4 N. Y. App. Div. 465; 38 N. Y. Supp. 655; Louisville, etc. R. Co. v. Mitchell [Ky.], 29 S. W. 860; Inman v. Elberton R. Co., 90 Ga. 663; 16 S. E. 958; Montgomery v. Muskegon Co., 88 Mich. 633; 50 N. W. 729; Megow v. Chicago, etc. R. Co., 86 Wisc. 466; 56 N. W. 1099; Peck v. Missouri Pac. R. Co., 31 Mo. App. 123; Fish v. Chicago, etc. R. Co., 81 Iowa, 280; 46 N. W. 998; Louis v. Union Pac. R. Co., 48 Neb. 151; 66 N. W. 1133; Denver, etc. R. Co. v. De Graff, 2 Colo. App. 42; 29 Pac. 664. There must be a preponderance of affirmative evidence (White v. Chicago, etc. R. Co., 1 S. Dak. 326; 47 N. W. 146; Martin v. Missouri Pac. R. Co., 3 Tex. Civ. App. 133; 22 S. W. 195). In all the foregoing cases, the plaintiff's evidence was held insufficient either to warrant submission of case to jury, or to support a verdict in his favor. The list might be extended. Where all the evidence as to the escape of fire relates to one of several locomotives which passed shortly before the fire was

discovered, it is error to charge that, if the jury find that the property was burned by reason of sparks escaping from defendant's engines, or *any* of them, plaintiffs are entitled to recover (Phoenix Ins. Co. v. N. Y. Central R. Co., 75 Hun, 216; 26 N. Y. Supp. 1102).

² Fremantle v. Northwestern R. Co., 10 C. B. N. S. 89. Sheldon v. Hudson River R. Co. (29 Barb. 226), to the contrary, was wrongly decided. In that case, the plaintiff proved that his mill was sixty-seven feet from the railroad, and that, a little more than an hour after the passage of a locomotive, emitting sparks, the mill was found to be on fire. Later New York cases support the text. Among others, see Douglas v. Rome, etc. R. Co., 52 Hun, 613; 5 N. Y. Supp. 214; Billings v. Fitchburg R. Co., 58 Hun, 605; 11 N. Y. Supp. 837; Shepp v. N. Y. Central R. Co., 51 Hun, 638; 4 N. Y. Supp. 951; Coolidge v. Rome, etc. R. Co., 52 Hun, 613; 5 N. Y. Supp. 301; Genung v. N. Y. & New England R. Co., 66 Hun, 632; 21 N. Y. Supp. 97; Jamieson v. N. Y. & Rockaway R. Co., 11 App. Div. 50; 42 N. Y. Supp. 915. Consult Flinn v. N. Y. Central R. Co., 142 N. Y. 11; 36 N. E. 1046; Babcock v. Fitchburg R. Co., 140 N. Y. 308; 35 N. E. 596; Tanner v. N.

And when the particular engine which caused the fire cannot be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon other occasions, at or about the time of the fire, before³

Y. Central R. Co., 108 N. Y. 623; 15 N. E. 379. Besides the foregoing, in each of the following cases circumstantial evidence as to origin of fire was admitted and held sufficient *prima facie*: Louisville, etc. R. Co. v. Malone, 109 Ala. 509; 20 So. 33; Louisville, etc. R. Co. v. Miller, 109 Ala. 500; 19 So. 989; Mouat Lumber Co. v. Wilmore, 15 Colo. 136; 25 Pac. 556; Union Pac. R. Co. v. De Busk, 12 Colo. 294; 20 Pac. 752; Lake Erie, etc. R. Co. v. Kirts, 29 Ill. App. 175; Chicago, etc. R. Co. v. Ostrander, 116 Ind. 259; 15 N. E. 227; 19 Id. 110; Cincinnati, etc. R. Co. v. Smock, 133 Ind. 411; 33 N. E. 108; Knight v. Chicago, etc. R. Co., 81 Iowa, 310; 46 N. W. 1112; Greenfield v. Chicago, etc., R. Co., 93 Iowa, 270; 49 N. W. 95; Johnson v. Chicago, etc. R. Co., 77 Iowa, 666; 42 N. W. 512; Hoyt v. Jeffers, 30 Mich. 181; Hagan v. Chicago, etc. R. Co., 86 Id. 615; 49 N. W. 509; Dean v. Chicago, etc. R. Co., 39 Minn. 413; 40 N. W. 270; Hoffman v. Chicago, etc. R. Co., 40 Minn. 60; 41 N. W. 301; Wilson v. Northern Pac. R. Co., 43 Minn. 519; 45 N. W. 1132; Tribette v. Illinois Cent. R. Co., 71 Miss. 212; 13 So. 899; Kenney v. Hannibal, etc. R. Co., 70 Mo. 243; s. c., again, 80 Id. 573; Logan v. Wabash R. Co., 43 Mo. App. 71; Pennsylvania R. Co. v. Watson, 81* Pa. St. 293; see Lackawanna, etc. R. Co. v. Doak, 52 Id. 379; Norfolk, etc. R. Co. v. Bohannon, 85 Va. 293; 7 S. E. 236; Stertz v. Stewart, 74 Wis. 160; 42 N. W. 214; Beggs v. Chicago, etc. R. Co., 75 Wisc. 444; 44 N. W. 633. Where the fire occurred on September 30, evidence of fires

caused by the same engine in April, May, and June, is properly excluded, the engine having been repaired in July, and sent from the shop in good condition (Menomonie River Co. v. Milwaukee, etc. R. Co., 91 Wisc. 447; 65 N. W. 176).

³Grand Trunk R. Co. v. Richardson, 91 U. S. 454; Chicago, etc. R. Co. v. Gilbert, 10 U. S. App. 375; 3 C. C. A. 264; 52 Fed. 711; Field v. N. Y. Central R. Co., 32 N. Y. 339; Sheldon v. Hudson River R. Co., 14 Id. 218; Piggot v. Eastern Counties R. Co., 3 C. B. 229; Bright-hope R. Co. v. Rogers, 76 Va. 443; Gowen v. Glaser [Penn.], 10 Atl. 417; Hoskinson v. Central Vt. R. Co., 66 Vt. 618; 30 Atl. 24; Thatcher v. Maine Cent. R. Co., 85 Me. 502; 27 Atl. 519 [about the same time and place]; Annapolis, etc. R. Co. v. Gantt, 39 Md. 115; Henry v. Southern Pacific R. Co., 50 Cal. 176; Hoyt v. Jeffers, 30 Mich. 181; Lake Erie, etc. R. Co. v. Cruzen, 29 Ill. App. 212; Missouri Pac. R. Co. v. Donaldson, 73 Tex. 124; 11 S. W. 163; Kentucky Cent. R. Co. v. Barrow, 89 Ky. 638; 20 S. W. 165; Donovan v. Chicago, etc. R. Co., 93 Wisc. 373; 67 N. W. 721; Union Pac. R. Co. v. Keller, 36 Neb. 189; 54 N. W. 420; Hoover v. Missouri Pac. R. Co., 115 Mo. 77; 16 S. W. 480; overruling Coale v. Hannibal, etc. R. Co., 60 Mo. 227. In Chicago, etc. R. Co. v. Williams (131 Ind. 30; 30 N. E. 696), evidence that, at a point where the fire started, there were dry grass and weeds extending up to the track; that passing locomotives frequently dropped coals of fire, which set fire to the ties; that the weather was dry

or after,⁴ is relevant and competent to show habitual negligence, and to make it probable⁵ that the plaintiff's injury proceeded from the same cause. It is not relevant for any other

and the wind was blowing in a direction which would carry fire towards plaintiff's property; and that there was a line of "burnt district" extending from defendant's right of way to plaintiff's land, was held sufficient to sustain a verdict for plaintiff.

⁴Evidence of other fires, at other points on the road, and at other times, both before and after the fire, though set by other locomotives, is admissible, as tending to show the possibility, and consequent probability, that a locomotive caused the fire, and to show a negligent habit of the officers and agents of the company (*Northern Pac. R. Co. v. Lewis*, 2 C. C. A. 446; 7 U. S. App. 254; 51 Fed. 658). *s. p.*, *Smith v. Old Colony, etc. R. Co.*, 10 R. I. 22; *Campbell v. U. S. Foundry Co.*, 73 Hun, 576; 26 N. Y. Supp. 165; *Koontz v. Oregon R. Co.*, 20 Oreg. 3; 23 Pac. 820). Where property is fired by sparks from a locomotive engine, and the proof shows that it might have been fired by sparks either from an unknown engine, or from one of several engines, some of which were unknown, it is competent to show that many of the engines threw sparks, and that numerous fires had been kindled on that part of the line; but such proof should be confined exclusively to occurrences at or about the time of the fire, with such reasonable latitude as to time as to render the proof practicable (*Henderson Co. v. Phila. & Reading R. Co.*, 144 Pa. St. 461; 22 Atl. 851). The connection between the fire and the engine being denied, and only provable by circumstantial evidence, and it not being pretended that the particular

engine was better made or manned than others of defendant's, evidence of fires set by engines, before and after the fire in question, at different places along the line, is competent to show possibility and probability of plaintiff's theory (*Campbell v. Missouri Pac. R. Co.*, 121 Mo. 340; 25 S. W. 936). In order to permit evidence as to the emission of sparks from the same engine six months after, it is necessary to show either that through the fault of its construction sparks of that size could be emitted, or else that the engine was in the same condition of repair that it was when the fire occurred (*Collins v. N. Y. Central R. Co.*, 109 N. Y. 243; 16 N. E. 50).

⁵Evidence must be first given excluding the probability that the fire in question originated from another cause (*Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Field v. N. Y. Central R. Co.*, 32 N. Y. 339; *Crest v. Erie R. Co.*, 58 Id. 638; *Sheldon v. Hudson River R. Co.*, 14 Id. 218; *O'Neil v. N. Y., Ontario, etc. R. Co.*, 115 Id. 579; 22 N. E. 217; *Pennsylvania R. Co. v. Stranahan*, 79 Pa. St. 405; *Boyce v. Cheshire R. Co.*, 43 N. H. 627; *Slossen v. Burlington, etc. R. Co.*, 60 Iowa, 214; 14 N. W. 244; *Watt v. Nevada Cent. R. Co.*, Nev. ; 44 Pac. 423). See *Atchison, etc. R. Co. v. Stanford*, 12 Kans. 354; *Loring v. Worcester, etc. R. Co.*, 131 Mass 469; *Albert v. Northern Central R. Co.*, 98 Pa. St. 316; *St. Louis, etc. R. Co. v. Jones*, 59 Ark. 105; 26 S. W. 595. As to when preliminary proof excluding probability will not be required, see *Wheeler v. N. Y. Central R. Co.*, 67 Hun, 639; 22 N. Y. Supp. 561.

purpose.⁶ Of course, evidence as to the habitual management and condition of the particular engine which caused the fire is relevant and valuable.⁷

§ 676. Burden of proof. — The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be), which have been already mentioned as necessary.¹ This is the common law of England,² and the same rule has been followed in the Federal courts,³ and in the state courts mentioned below.⁴ In other

⁶ It is not relevant, for example, for the purpose of showing the defective condition of a particular engine or its equipment (St. Louis, etc. R. Co. v. Jones, 59 Ark. 105; 26 S. W. 595; Albert v. Northern Cent. R. Co., 98 Pa. St. 316; Erie R. Co. v. Decker, 78 Id. 293; Tribette v. Illinois Cent. R. Co., 71 Miss. 212; 13 So. 899; Jacksonville, etc. R. Co. v. Peninsular Land Co., 27 Fla. 1, 157; 9 So. 661; Menomonic River Co. v. Milwaukee, etc. R. Co., 91 Wisc. 447; 65 N. W. 176), except to rebut evidence that defendant had done its duty in providing sufficient spark-arresters on all its engines (Lake Erie, etc. R. Co. v. Cruzen, 29 Ill. App. 212; Lake Erie, etc. R. Co. v. Kirts, 29 Id. 175; Lake Erie, etc. R. Co. v. Helmerick, 29 Id. 270; Lake Erie, etc. R. Co. v. Middlecoff, 150 Ill. 27; 37 N. E. 660). See Smith v. Chicago, etc. R. Co., 4 S. Dak. 71; 55 N. W. 717; Inman v. Elberton R. Co., 90 Ga. 663; 16 S. E. 958; Haley v. St. Louis, etc. R. Co., 69 Mo. 614; Huyett v. Phila., etc. R. Co., 23 Pa. St. 373.

⁷ Cases cited under next section.

¹ Bass v. Chicago, etc. R. Co., 28 Ill. 9; Illinois Central R. Co. v. Mills, 42 Ill. 407; Piggott v. Eastern Coun-

ties R. Co., 3 C. B. 229; Fitch v. Pacific R. Co., 45 Mo. 322; Bedford v. Hannibal, etc. R. Co., 46 Mo. 456; Spaulding v. Chicago, etc. R. Co., 30 Wisc. 110; Case v. Northern Central R. Co., 59 Barb. 644. See Bedell v. Long Island R. Co., 44 N. Y. 367; Ellis v. Portsmouth, etc. R. Co., 2 Ired. Law, 138; McCready v. South Carolina R. Co., 2 Strobb. 356, per Richardson, J. On proof of fire communicated from engine and destruction of property, plaintiff is entitled to recover, as matter of law, on defendant's failure to show that the engine was equipped to prevent the escape of fire, as required by law (Campbell v. Goodwin, 87 Tex. 273; 28 S. W. 273). To same effect, all cases cited in note 5, *infra*.

² Piggott v. Eastern Counties R. Co., 3 C. B. 229.

³ Eddy v. Lafayette, 4 U. S. App. 247; 1 C. C. A. 441; 49 Fed. 807; affirmed, 163 U. S. 456; 16 S. Ct. 1082.

⁴ So in *New York* (Case v. Northern Central R. Co., 59 Barb. 644; Lowery v. Manhattan R. Co., 99 N. Y. 158; 1 N. E. 608; Bedell v. Long Island R. Co., 44 N. Y. 367; Genung v. N. Y. & New England R. Co., 66 Hun. 632; 21 N. Y. Supp. 97); in *Maryland*

states the same rule is established by statute.⁵ In Pennsylvania,

(Green Ridge R. Co. v. Brinkman, 64 Md. 52; 20 Atl. 1024; Annapolis, etc. R. Co. v. Gantt, 39 Md. 115; see Ryan v. Gross, 68 Id. 377; 12 Atl. 115); in *North Carolina* (Ellis v. Portsmouth, etc. R. Co., 2 Ired. Law, 138; see Lawton v. Giles, 90 N. C. 374); in *South Carolina* (McCready v. South Carolina R. Co., 2 Strobb. 356); in *Alabama* (Louisville etc. R. Co. v. Reese, 85 Ala. 497; 5 So. 283; Louisville, etc. R. Co. v. Malone, 109 Ala. 509; 20 So. 33); in *Louisiana* (Meyer v. Vicksburg, etc. R. Co., 41 La. Ann. 639; 6 So. 218; Gumbel v. Illinois Cent. R. Co., 48 La. Ann. 1180; 20 So. 703); in *Texas* (International, etc. R. Co. v. Timmerman, 61 Tex. 660; Missouri Pac. R. Co. v. Bartlett, 81 Id. 42; 16 S. W. 638; Texas, etc. R. Co. v. Levine, 87 Tex. 437; 29 S. W. 466); in *Tennessee* (Simpson v. East Tenn., etc. R. Co., 5 Lea, 456); in *Illinois* (Bass v. Chicago, etc. R. Co. 28 Ill. 9; Illinois Cent. R. Co. v. Mills, 42 Id. 407; St. Louis, etc. R. Co. v. Strotz, 47 Ill. App. 342); in *Iowa* (Greenfield v. Chicago, etc. R. Co., 83 Iowa, 270; 49 N. W. 95); in *Wisconsin* (Spaulding v. Chicago, etc. R. Co., 30 Wisc. 110; Abbot v. Gore, 74 Id. 509; 43 N. W. 365; Moore v. Chicago, etc. R. Co., 78 Wisc. 120; 47 N. W. 273); in *Missouri* (Kenney v. Hannibal, etc. R. Co., 70 Mo. 243; Fitch v. Pacific R. Co., 45 Id. 322; Coates v. Missouri, etc. R. Co., 61 Id. 38; Palmer v. Missouri Pac. R. Co., 76 Id. 217); in *Nebraska* (Burlington, etc. R. Co. v. Westover, 4 Neb. 268; Union Pac. R. Co. v. Keller, 36 Neb. 189; 54 N. W. 420); in *North Dakota* (Johnson v. Northern Pac. R. Co., 1 N. Dak. 354; 48 N. W. 227; Smith v. Northern Pac. R. Co., 3 N. Dak. 17; 53 N. Dak. 173);

in *South Dakota* (Mattoon v. Fremont, etc. R. Co., 6 S. Dak. 301, 60 N. W. 69); in *Oregon* (Koontz v. Oregon R. Co., 20 Ore. 3; 23 Pac. 820).

⁵So in *Vermont* (Vt. R. S [1880], § 3444; Gen. Stat., ch. 28, § 78; see Cleaveland v. Grand Trunk R. Co., 42 Vt. 449); in *New Hampshire* (Gen. Laws, ch. 162, § 8; Haseltine v. Concord R. Co., 64 N. H. 545; 15 Atl. 143); in *Maine* (Rev. St., ch. 51, § 64; Thatcher v. Maine Cent. R. Co., 85 Me. 503; 27 Atl. 519; Martin v. Grand Trunk R. Co., 87 Me. 411; 32 Atl. 976); in *Connecticut* (Gen. St., § 3581; Martin v. N. Y. & New England R. Co., 62 Conn. 331; 25 Atl. 239 [liability irrespective of negligence]); in *New Jersey* (N. J. Rev. Stat., p. 911, § 13); in *South Carolina* (Gen. St., § 1511; Mayo v. Spartanburg, etc. R. Co., 40 S. C. 517; 19 S. E. 73); in *Georgia* (Code, § 3033; East Tennessee, etc. R. Co. v. Hesters, 90 Ga. 11; 15 S. E. 828); in *Mississippi* (Code, §§ 1054, 1059; see Mobile, etc. R. Co. v. Gray, 62 Miss. 383; Louisville, etc. R. Co. v. Natchez, etc. R. Co., 67 Id. 399; 7 So. 350); in *Illinois* (R. S., ch. 114, § 89; Chicago, etc. R. Co. v. Pennell, 110 Ill. 435; Chicago, etc. R. Co. v. Clampit, 63 Id. 95; Chicago, etc. R. Co. v. Goyette, 133 Id. 21; 24 N. E. 549; Louisville, etc. R. Co. v. Black, 54 Ill. App. 82); in *Iowa* (Code, § 1289; Small v. Chicago, etc. R. Co., 50 Iowa, 338; Slossen v. Burlington, etc. R. Co., 60 Id. 215; 14 N. W. 244; Seska v. Chicago, etc. R. Co., 77 Iowa, 137; 41 N. W. 596; Rose v. Chicago, etc. R. Co., 72 Iowa, 625; 34 N. W. 450); in *Missouri* (Rev. St. 1889, § 2615; Mathews v. St. Louis, etc. R. Co., 121 Mo. 298; 24 S. W. 591; Campbell v. Missouri Pac. R. Co.,

Ohio and Indiana, however, the rule is that plaintiff is bound to prove affirmatively some precaution which the defendant ought to have taken, but did not take.⁶ This ruling is contrary to the plain principle that a party is not required to prove a fact which is necessarily much better known to his adversary than to himself, since the railroad company has unlimited opportunities for knowing the condition of its own engines; while its prosecutor has none at all, until he comes into court.⁷ In every case, it is held that a presumption of negligence is raised by evidence that engines are, in common practice, so made as to retain their sparks, and that the par-

121 Mo. 349; 25 S. W. 936; Reed v. Missouri Pac. R. Co., 50 Mo. App. 504; in *Minnesota* (Gen. Stat. c. 34, § 60; see Karsen v. Milwaukee, etc. R. Co., 29 Minn. 12; 11 N. W. 122; Bowen v. St. Paul, etc. R. Co., 36 Minn. 522; 32 N. W. 751; Hoffman v. Chicago, etc. R. Co., 43 Minn. 334; 45 N. W. 608); in *Kansas* (Comp. Laws, c. 155, § 5275; Missouri Pac. R. Co. v. Cady, 44 Kans. 633; 24 Pac. 1088; Atchison, etc. R. Co. v. Gibson, 42 Kans. 34; 21 Pac. 788; Ft. Scott, etc. R. Co. v. Karracker, 46 Kans. 511; 26 Pac. 1027; St. Louis, etc. R. Co. v. Snavely, 47 Kans. 637; 28 Pac. 615 [Gen. Stat. 1889, § 1321]); in *Colorado* (Gen. Stat., § 2793; Union Pac. R. Co. v. De Busk, 12 Colo. 294; 20 Pac. 752 [absolute liability]; Union Pac. Ry. Co. v. Arthur, 2 Colo. App. 159; 29 Pac. 1031; Union Pac. R. Co. v. Williams, 3 Colo. App. 526; 34 Pac. 731); in *Utah* (Comp. Laws, § 503; Anderson v. Wasatch, etc. R. Co., 2 Utah, 518). Doubtless there are other states having similar statutes.

⁶ So held in *Pennsylvania* (Jennings v. Penn. R. Co., 93 Pa. St. 337; Albert v. Northern Cent. R. Co., 98 Id. 316; Phil. & Reading R. Co. v. Yerger, 73 Id. 121; Henderson Co. v. Phil. & Reading R. Co., 144 Pa. St. 461; 22 Atl. 851). A fire started

upon the right of way is insufficient to prove negligence on part of company (Taylor v. Penn., etc. R. Co. [Pa. Sup.], 34 Atl. 457). So in *Ohio* (Ruffner v. Cincinnati, etc. R. Co., 34 Ohio St. 96); and formerly in *Kansas* (Kansas Pac. R. Co. v. Butts, 7 Kans. 308); and *Iowa* (Gandy v. Chicago, etc. R. Co., 30 Iowa, 420; McCummons v. Chicago, etc. R. Co., 33 Id. 187). But otherwise now, by statute. In *Indiana*, the burden of proof is on plaintiff (Chicago, etc. R. Co. v. Ostrander, 116 Ind. 259; 15 N. E. 227; re-affirming Indianapolis, etc. R. Co. v. Paramore, 31 Ind. 143).

⁷ "The agents and employees of the road know that the engine is properly equipped to prevent fire from escaping; and they know whether any mechanical contrivances were employed for that purpose, and if so, what was their character. Whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information" (Spaulding v. Chicago, etc. R. Co., 30 Wisc. 110, 121, following Galpin v. Chicago, etc. R. Co., 19 Id. 608). But it was admitted by the court that the authorities in opposition to their rule were quite numerous.

ticular engine in question did not.⁸ And if the particular engine from which the fire proceeded was so made, but it appears that, unless it was watched and kept in order, it would emit sparks, the inference may fairly be drawn that the fire was caused by negligence in its management.⁹ And even uncontradicted evidence that the apparatus was in good order, and that those in charge were competent and skillful, does not of itself prove that the fire did not originate from the engine; to do that, defendant ought to show that the fire could have originated in some other way.¹⁰ On the other hand, evidence that the engine which emitted the sparks had proper spark-arresters, which were in good condition at the time,¹¹ is sufficient to put the burden of proof again upon plaintiff to show negligence.¹² In such case, the plaintiff may discharge the burden

⁸ When it is shown that the same engine set out other fires elsewhere at about the same time, the jury may well find that the *prima facie* case is not overcome by evidence of care on defendant's part (*Seska v. Chicago, etc. R. Co.*, 77 Iowa, 137; 41 N. W. 596). *s. p.*, *Louisville, etc. R. Co. v. Malone*, 109 Ala. 509; 20 So. 33; and see cases cited in note, 13, *infra*.

⁹ *Field v. N. Y. Central R. Co.* 32 N. Y. 339. See *Huyett v. Phil. & Reading R. Co.*, 23 Pa. St. 373. A verdict finding negligence was sustained, in view of the statutory presumption of negligence, where defendant failed to show whether the dampers, beneath the fire-box, or either of them, were closed (*Canton v. Eastern R. Co.*, 45 Minn. 481; 48 N. W. 22). In *Stacy v. Milwaukee, etc. R. Co.* 85 Wisc. 225; 54 N. W. 779, there was evidence that after the train departed "ashes, cinders and coals" were found between the rails, and that the fire could be traced from the track, in the sawdust. It was shown that the engine was new, perfectly constructed, and supplied with all the

modern appliances to prevent the escape of fire. Held, error to direct a verdict for defendant.

¹⁰ *Hagan v. Chicago, etc. R. Co.*, 86 Mich. 615; 49 N. W. 509.

¹¹ Without proof that the arresters were in good condition and repair at the time of the fire, the statutory presumption of negligence, created by the fact that the fire was caused by sparks thrown out by the engine is not rebutted (*Toledo, etc. R. Co. v. Kingman*, 49 Ill. App. 43). There is no presumption of law that an engine, inspected before starting on its trip, and found in good condition, remained in good condition during the trip (*Louisville, etc. R. Co. v. Malone*, 109 Ala. 509; 20 So. 33).

¹² The company rebuts the presumption of negligence by showing that the engine was provided with the best known spark-arresters (*Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E. 66; *Phil. & Reading R. Co. v. Latshaw*, 93 Pa. St. 449); and was skillfully and carefully handled (*Brown v. Atlanta, etc. R. Co.*, 19 S. C. 39). *s. p.*, *Daly v. Chicago, etc. R. Co.*, 43 Minn. 319; 45 N. W. 611; *Ft. Worth, etc.*

by showing that the particular engine was defective or was negligently managed. This he may do, by circumstances falling short of positive proof, *e. g.* that it had thrown sparks to a greater distance or in larger volume than an engine in good order and properly managed could throw;¹³ or if the particular engine is not identified, that all its engines habitually

R. Co. v. Wallace, 74 Tex. 581; 12 S. W. 227; Meyer v. Vicksburg, etc. R. Co., 41 La. Ann. 639; Brown v. Missouri Pac. R. Co., 13 Mo. App. 462; Missouri Pac. R. Co. v. Cullers, 81 Tex. 382; 17 S. W. 19; Biering v. Gulf, etc. R. Co., 79 Tex. 584; 15 S. W. 576. In Babcock v. Fitchburg R. Co. (140 N. Y. 308; 35 N. E. 596), it was held that inasmuch as defendant's locomotive was admittedly in perfect condition, plaintiff had the burden to prove that said engine was less safe, in the matter of sparks, than a newer pattern of engine known and in use at the time.

¹³ It appearing that an engine in good repair could not throw fire from the track to the place where the fire caught, the jury are justified in finding the engine in bad repair (Johnson v. Chicago, etc. R. Co., 77 Iowa, 666; 42 N. W. 512). Negligence may be inferred from the fact that the engine habitually scattered sparks to such an extent as to endanger the combustible material along the line of the road (Green Ridge R. Co. v. Brinkman, 64 Md. 52; 20 Atl. 1024). *s. p.*, Philadelphia, etc. R. Co. v. Schultz, 93 Pa. St. 341; Canada Central R. Co. v. McLaren, 8 Ont. App. 564; Johnson v. Chicago, etc. R. Co., 31 Minn. 57; Louisville, etc. R. Co. v. Taylor, 92 Ky. 55; 17 S. W. 198. An engine which throws sparks one hundred feet from the track is not provided with proper appliances (Illinois Cen. R. Co. v. McClelland, 42 Ill. 355; Missouri Pac. R. Co. v. Texas, etc.

R. Co., 41 Fed. 917). The fact that defendant's engines had before frequently emitted showers of sparks on the house, firing it on several occasions, is evidence of negligence (Flinn v. N. Y. Central R. Co., 67 Hun, 631; 22 N. Y. Supp. 473; Louisville, etc. R. Co. v. McCorkle, 12 Ind. App. 652; 40 N. E. 26; Slossen v. Burlington, etc. R. Co., 60 Iowa, 215; 14 N. W. 244; Haseltine v. Concord R. Co., 64 N. H. 545; 15 Atl. 143). But plaintiff cannot show the size of the sparks emitted from the engine several months after the fire, without any proof that the construction of the arrester was clearly defective in the first place, or that the engine and arrester were in the same condition of repair as at the time of the fire (Collins v. N. Y. Central R. Co., 109 N. Y. 243; 16 N. E. 50). And the emission of one large spark from defendant's engine three days after the fire does not show that it was out of order at the time of the fire, since there was ample time in three days for some accident to have happened to the spark-arrester (Wheeler v. N. Y. Central R. Co., 67 Hun, 639; 22 N. Y. Supp. 561). That engines emit sparks does not of itself show negligence (Brown v. Buffalo, etc. R. Co., 4 N. Y. App. Div. 465; 38 N. Y. Supp. 655). But as to the dropping of live coals from elevated railroad engine, see Flynn v. Manhattan R. Co., 20 N. Y. Supp. 562; Sugarman v. Manhattan R. Co., 16 N. Y. Supp. 533.

throw sparks or scatter fire to a dangerous extent.¹⁴ The negligent operation of an engine may be shown by evidence that no such body of coals and cinders as fell, on the occasion in question, could have fallen from the engine if the ashpan had been in proper condition and the dampers closed,¹⁵ and the like.

§ 677. [omitted.*]

§ 678. Combustibles on right of way.—A railroad company ought to keep its track and premises generally in such a state as will not unnecessarily offer facilities for the spread of fire from the dangerous machines which it keeps in constant use. At common law, no presumption of negligence arises from the mere fact of accumulation of combustible materials on its right of way;¹ but a failure to use reasonable diligence to remove such materials or to take other reasonable precautionary measures against their taking fire from its engines, in con-

¹⁴ *Cleaveland v. Grand Trunk R. Co.*, 42 Vt. 449; *Lake Side R. Co. v. Kelly*, 10 Ohio C. C. 322. Where defendant's inspector has testified that, so far as he knew, the screen used on the engine alleged to have emitted the sparks was the same as was used on all the engines on the road, does not entitle the plaintiff to show in rebuttal that fires frequently sprung up after the passage of other engines (*Allard v. Chicago, etc. R. Co.*, 73 Wisc. 165; 40 N. W. 685).

¹⁵ *Kurz Ice Co. v. Milwaukee, etc. R. Co.*, 84 Wisc. 171; 53 N. W. 850. To open the grates so that burning cinders are scattered on the roadbed is negligence (*Martin v. Western Un. R. Co.*, 23 Wisc. 437). Evidence that the ash pan was too short, allowing the damper to swing open, thereby facilitating the dropping of live coals, and that the engine set four fires in running a little over a mile, is sufficient to justify submission of the question as to whether the engine was in a reasonably safe

condition (*Mills v. Chicago, etc. R. Co.*, 76 Wisc. 422; 45 N. W. 225).

* We omit any consideration of the statutory liabilities of railroad companies for damages from fires caused by locomotive sparks, etc., (which was the subject of this section in our last edition), not only for want of space—every state having one or more statutes on the subject more or less diverse—but because some of them impose a liability irrespective of negligence, and none of them are of sufficient general interest to be of value outside the respective jurisdictions adopting them.

¹ *Gulf, etc. R. Co. v. Benson*, 69 Tex. 407; 5 S. W. 822. It is not *per se* negligence to permit combustible material, such as "stalks, grass, grain, or stubble," to grow or remain on right of way in considerable quantities (*Union Pac. R. Co. v. Gil-land, Wyo.*; 34 Pac. 953). But compare *Gulf, etc. R. Co. v. Rowland*, Tex. Civ. App.; 23 S. W. 421.

sequence of which a fire, kindled in such materials, spread to the plaintiff's property, though not conclusive,² is sufficient evidence of negligence to submit to a jury.³ And the company is not relieved from liability for such negligence on proof of its freedom from negligence in the construction, equipment or management of its engines;⁴ nor is it so exempt on showing

² "It is not an indisputable conclusion of law that a railway company is guilty of negligence, to be inferred from the fact that fire ignites in dry weeds or grass on the land of the railway. It is a question of fact, to be determined by the jury, in view of the extent to which dead grass and weeds have been allowed to accumulate in the locality, the season of the year, and all other circumstances affecting liability to fire" (Illinois Cent. R. Co. v. Mills, 42 Ill. 407, per Walker, C. J.). See, also, Kansas Pac. R. Co. v. Butts, 7 Kans. 308; Herne v. So. Pac. R. Co., 50 Cal. 482. A railroad company is not an insurer that fire will not arise from combustible materials on its right of way, but it must keep its track and right of way reasonably free from such materials (Briant v. Detroit, etc. R. Co., 104 Mich. 307; 62 N. W. 365).

³ Eddy v. Lafayette, 163 U. S. 456; 16 S. Ct. 1082; aff'g 4 U. S. App. 247; 1 C. C. A. 441; 49 Fed. 807; Richmond, etc. R. Co. v. Medley, 75 Va. 499. The true question for the jury to determine in such a case is: "From the evidence and all the circumstances and surroundings, including the dryness of the time, did the defendant permit such an accumulation of grass, weeds, or leaves, of a combustible nature, within its right of way, at the point where the said fire occurred, exposed to ignition by its engines, as would not be permitted by a prudent man upon his own premises, if exposed to

the same hazard from fire?" (Snyder v. Pittsburgh, etc. R. Co., 11 W. Va. 14). s. p., Louisville, etc. R. Co. v. Miller, 109 Ala. 500; 19 So. 989; St. Johns, etc. R. Co. v. Ransom, 33 Fla. 406; 14 So. 892; Black v. Aberdeen, etc. R. Co. 115 N. C. 667; 20 S. E. 713, 909; Aycock v. Raleigh, etc. R. Co., 89 N. C. 321; Clarke v. Chicago, etc. R. Co., 33 Minn. 359; Kellogg v. Chicago, etc. R. Co., 26 Wisc. 223; Moore v. Chicago, etc. R. Co., 78 Id. 120; 47 N. W. 273; Abbot v. Gore, 74 Wisc. 509; 43 N. W. 365; Poeppers v. Missouri, etc. R. Co., 67 Mo. 715; in all of which cases there was a finding of negligence against the company in allowing such accumulations. See, also, Ohio, etc. R. Co., v. Shanefelt, 47 Ill. 497; Illinois Cent. R. Co. v. Mills, 42 Id. 407; Flynn v. San Francisco, etc. R. Co., 40 Cal. 14; White v. Missouri Pac. R. Co., 31 Kans. 280; 1 N. W. 611; Diamond v. Northern Pac. R. Co., 6 Mont. 580; 13 Pac. 367; Comes v. Chicago, etc. R. Co., 78 Iowa, 391; 43 N. W. 235; West v. Chicago, etc. R. Co., 77 Iowa, 654; 35 N. W. 479; s. c., 42 Id. 512.

⁴ Stacy v. Milwaukee, etc. R. Co., 85 Wisc. 225; 54 N. W. 779; Steele v. Pacific Coast R. Co., 74 Cal. 323; 15 Pac. 851; Gram v. Northern Pac. R. Co., 1 N. Dak. 252; 46 N. W. 972; Kelsey v. Chicago, etc. R. Co., 1 S. Dak. 80; 45 N. W. 204; Toledo, etc. R. Co. v. Endres, 57 Ill. App. 69; Lake Erie, etc. R. Co. v. Clark, 7 Ind. App. 155; 34 N. E. 587. In

due care and diligence on the part of its servants in arresting the fire and preventing its spread;⁵ for diligence in trying to put a stop to the effects of its negligence cannot relieve it from responsibility for the original negligence. But as negligence is the ground of the action, it is incumbent on plaintiff to show, even under a statute imposing liability on railroad companies for failure to keep their rights of way free from combustibles, that a sufficient quantity of such material was present to indicate to common prudence a danger from fire.⁶ The duty applies to natural vegetation, while standing upon the land,⁷ as well as to the same vegetation, when cut down and suffered to lie in drying heaps, for an unreasonable time,⁸

O'Neill v. N. Y., Ontario, etc. R. Co. (Union Pac. R. Co. v. Buck, 3 (115 N. Y. 579; 22 N. E. 217), a verdict against defendant for allowing combustible material to accumulate along its track, was sustained, though it did not appear that the engine was not properly provided with a spark arrester, or that it was out of order or mismanaged. In Eighmie v. Rome, etc. R. Co. (57 Hun, 536; 10 N. Y. Supp. 600), defendant proved the good equipment of the engine and its careful management, but a verdict against it was sustained. See N. Y., Phila., etc. R. Co. v. Thomas, 92 Va. 606; 24 S. E. 264; Louisville, etc. R. Co. v. Hart, 119 Ind. 273; 21 N. E. 753; Texas, etc. R. Co. v. Ross, 7 Tex. Civ. App. 653; 27 S. W. 728.

⁵ Spencer v. Montana R. Co., 11 Mont. 164; 27 Pac. 681. See Rost v. Missouri Pac. R. Co., 76 Tex. 168; 12 S. W. 1131.

⁷ Delaware, etc. R. Co. v. Salmon, 39 N. J. Law, 299; Poeppers v. Missouri, etc. R. Co., 67 Mo. 715; Burlington, etc. R. Co. v. Westover, 4 Neb. 268; Mobile, etc. R. Co. v. Gray, 62 Miss. 383. See, also, Illinois Cent. R. Co. v. Frazier, 64 Ill. 28. In Billings v. Fitchburg R. Co. (58 Hun, 605; 11 N. Y. Supp. 837), there were weeds, yarrow, and burdock that grew there the summer before, as well as bushes and weeds two feet high, and also a pile of dry chippings from pine trees. Held, sufficient to justify a finding of negligence. S. P., Rockford, etc. R. Co. v. Rogers, 62 Ill. 346 [undergrowth of grass grown the previous fall, and not removed].

⁸ Austin v. Chicago, etc. R. Co., 93 Wisc. 496; 67 N. W. 1129; Abbot v. Gore, 74 Wisc. 509; 43 N. W. 365. But in Indiana, it is held that there must be proof of some negligence in permitting the fire to spread, as well as in originating it (Pittsburgh, etc. R. Co. v. Culver, 60 Ind. 469; Pittsburgh, etc. R. Co. v. Nelson, 51 Ind. 150; Toledo, etc. R. Co. v. Wand, 48 Id. 476; Pittsburgh, etc. R. Co. v. Hixon, 79 Id. 111; Louisville, etc. R. Co. v. Spann, 87 Id. 322.) The Indiana rule seems to be approved in Kansas

Smith v. London & So. West. R. Co., L. R. 6 C. P. 14; aff'g L. R. 5 C. P. 98. Whether it was negligent not to remove weeds and grass which had been mown and left on the right of way during a dry sum-

on any part of the right of way.⁹ And the duty is obligatory upon the party actually operating the road, whether as owner, lessee or otherwise.¹⁰ Several states, as also Canada, have statutes imposing on railroad companies an absolute duty to keep their rights of way clear from combustible materials, and their simple failure to do so is actionable negligence.

§ 679. Contributory negligence. — One who is exposed to the risk of injury from another's fire is undoubtedly bound to take such precautions to protect himself as a prudent man would usually take in view of the danger, but is under no obligation to do more than this. Thus, if the plaintiff, or his servant in charge, saw fire approaching, and could have extinguished it before it reached his land, by the use of ordinary diligence, the plaintiff cannot recover from the person by whose

mer month, is for the jury (*Brown v. Buffalo, etc. R. Co.*, 4 N. Y. App. Div. 465; 38 N. Y. Supp. 655; *Van Nostrand v. Wallkill Val. R. Co.*, 64 Hun, 636; 19 N. Y. Supp. 621; *St. Louis, etc. R. Co. v. Richardson*, 47 Kans. 517; 28 Pac. 183). But allowing them to remain thereon during the winter is insufficient to show negligence (*Taylor v. Pennsylvania Val. R. Co.*, 174 Pa. St. 171; 34 Atl. 457).

⁹ The duty to keep the right of way clear of combustibles extends to its full width (*Blue v. Aberdeen, etc. R. Co.*, 117 N. C. 644; 23 S. E. 275); and even to a temporary side track laid under a license from plaintiff for use in connection with his property (*Kurz, etc. Ice Co. v. Milwaukee, etc. R. Co.*, 84 Wisc. 171; 53 N. W. 850). As to duty of a railroad company to keep its right of way "entirely" free from combustible materials, see *Chicago, etc. R. Co. v. Gilbert*, 10 U. S. App. 375; 3 C. C. A. 264; 52 Fed. 711. Under a statute which declares a failure of a railroad company to keep its track and right of way, to the distance of 100 feet on each side, free from dead

grass, weeds, and other combustible material, to be *prima facie* evidence of negligence, the fact that the right of way at points other than that at which the fire was set out by its locomotive, but in the immediate neighborhood, was incumbered by combustible material, is admissible (*Northern Pac. R. Co. v. Lewis*, 7 U. S. App. 254; 2 C. C. A. 446; 51 Fed. 658 [action under Montana stat.]). Under the Kansas statute, if the company has removed all combustible materials within 140 feet of its track, it is not chargeable with negligence (*Union Pac. R. Co. v. Buck*, 3 Kans. App. 904; 44 Pac. 904).

¹⁰ Hence a company operating the road cannot escape liability on the ground that the accumulation of the dry grass and brush was due to the carelessness of the former operator; for having adopted the road for its own use, and having negligently set on fire the combustible material, it is answerable for the consequence (*Genung v. N. Y. & New England R. Co.*, 66 Hun, 632; 21 N. Y. Supp. 97; *Lake Erie, etc. R. Co. v. Cruzen*, 29 Ill. App. 212).

fault the fire originated,¹ even if the latter likewise saw the fire, and neglected to extinguish it.² He should use the same diligence to prevent it from extending upon his own land that a prudent man would use, had the fire been started by his own negligence.³ But in order to prevent his recovery, it must appear that any delay on his part,⁴ or even failure to make any effort whatever,⁵ to extinguish the fire, after it reached his land, contributed to his loss. And it would nowhere be held that one is bound to supply himself with appliances for extinguishing fire, in anticipation of another's negligence.⁶ Where it is the custom of the country to take certain precautions against fire, *c. g.*, to plow around hay-stacks, the plaintiff's neglect to follow the custom may be left to the jury to decide whether he was in fault.⁷ His failure to do so is

¹ Illinois Central R. Co. v. McClelland, 42 Ill. 355; Richter v. Harper, 95 Mich. 221; 54 N. W. 768; Eaton v. Oregon R. Co., 19 Ore. 391; 24 Pac. 415. See Haverly v. State Line R. Co., 135 Pa. St. 50; 19 Atl. 1013 [plaintiff endeavored to extinguish fire and thought, mistakenly, he had done so: for the jury]; Austin v. Chicago, etc. R. Co., 93 Wisc. 496; 67 N. W. 1129 [no fault in leaving a fire not wholly extinguished, when no danger of its revival was reasonably to be apprehended]. Contributory negligence will not be imputed to one injured while endeavoring to extinguish a fire on adjoining land, on the theory that his effort to save the property of his neighbor, rather than defendant's negligence in setting the fire, was the proximate cause of his injury (Liming v. Illinois Cent. R. Co., 81 Iowa, 246; 47 N. W. 66).

² Illinois Cent. R. Co. v. McKay, 69 Miss. 139; 12 So. 447.

³ Illinois Cent. R. Co. v. McClelland, 42 Ill. 355. See Chicago, etc. R. Co. v. Pennell, 94 Id. 448; McNarra v. Chicago, etc. R. Co., 41 Wisc. 69; Doggett v. Richmond, etc. R. Co., 78 N. C. 305; St. Louis, etc. R. Co. v. Hecht, 38 Ark. 357; Snyder v. Pitts-

burgh, etc. R. Co., 11 W. Va. 15. But where fire originated thirty or forty rods from plaintiff's land, evidence that he saw smoke rising from defendant's track for two or three days (the last time being eight days before his property was burned) and took no measures to have the fire extinguished, did not sustain a finding of contributory negligence (McNarra v. Chicago, etc. R. Co., 41 Wisc. 69).

⁴ Mills v. Chicago, etc. R. Co., 76 Wis. 422; 45 N. W. 225 [question for jury].

⁵ Sugarman v. Manhattan R. Co., 16 N. Y. Supp. 533 [plaintiff, frightened, ran away].

⁶ McLaren v. Canada Central R. Co., 32 Upper Canada [C. P.], 324.

⁷ Plaintiff stacked hay on an open prairie about a mile and a half from the railroad, with dry grass all around it. It was usual in that part of the country to plow around such stacks, but plaintiff did not so plow. Held, that whether he had done all he should to protect his property was a question for the jury (Kansas Pac. R. Co. v. Brady, 17 Kans. 380; Missouri Pac. R. v. Kincaid, 29 Id. 654; St. Joseph,

certainly not negligence as matter of law.⁸ It may be that any use of land which would be so highly dangerous anywhere, on account of liability to fire, as to be restrained by special laws, would be deemed evidence of contributory negligence, when applied to land adjoining a railroad. The voluntary and needless accumulation of shavings or other combustible matter upon the land, close to a railroad, has been so regarded; the case being plainly distinguishable from those in which combustible matter had accumulated by the act of nature.⁹ The entire doctrine of those cases is, however, open to serious question; and certainly no exposure of inflammable materials, in the orderly conduct of a legitimate business at a place where, if the railroad did not exist, such materials could thus

etc. R. Co. v. Chase, 11 Id. 47). The failure to so plow was held not to be negligence in Burlington, etc. R. Co. v. Westover, 4 Neb. 268; Kesse v. Chicago, etc. R. Co., 30 Iowa, 78; and in Slosson v. Burlington, etc. R. Co., 60 Id. 215; 14 N. W. 244. Even though he was guilty of contributory negligence in failing to plow, it is no defense to a statutory action in Iowa (West v. Chicago, etc. R. Co., 77 Iowa, 654; 42 N. W. 512). In Brown v. Brooks (85 Wisc. 290; 55 N. W. 395), plaintiff saw the fire on defendant's land twenty-four hours before it reached his hay. He apprehended danger, but he did not burn or mow the stubble around his stacks, but attempted to haul his hay away. Held, whether plaintiff used reasonable care to protect his hay was for the jury.

⁸Hoffman v. Chicago, etc. R. Co., 40 Minn. 60; 41 N. W. 301; Louisville, etc. R. Co. v. Hart, 119 Ind. 273; 21 N. E. 753; Ft. Scott, etc. R. Co. v. Tubbs, 47 Kans. 630; 28 Pac. 612; Union Pac. R. Co. v. McCollum, 2 Kans. App. 319; 43 Pac. 97; Union Pac. R. Co. v. Arthur, 2 Colo. App. 159; 29 Pac. 1031. See Eddy v. Lafayette, 4 U. S. App. 247; 1 C. C. A. 441; 49 Fed. 807.

⁹Murphy v. Chicago, etc. R. Co., 45 Wisc. 222, where Ward v. Milwaukee, etc. R. Co., 29 Id. 144, is approved, and other Wisconsin cases are distinguished. s. p., Coates v. Missouri, etc. R. Co., 61 Mo. 38; Macon, etc. R. Co. v. McConnell, 27 Ga. 481. Plaintiff's stable was about two feet from the railroad fence. He threw the bedding of the horse out of the window and allowed it to accumulate during a dry season from spring until end of July; near the track, where it was set fire to by a spark from an engine. Held, his negligence a question for the jury (Collins v. N. Y. Central R. Co., 5 Hun, 499). In Niskern v. Chicago, etc. R. Co. (22 Fed. 811), plaintiff failed because of his own negligence in piling his cornstalks so near the track. But no one is bound to clear the ground around his woodpile (Northern Pac. R. Co. v. Lewis, 7 U. S. App. 254; 2 C. C. A. 446; 51 Fed. 658). In Omaha Fair Ass'n v. Missouri Pac. R. Co. (42 Neb. 105; 60 N. W. 330), plaintiff allowed combustible matter to accumulate between the track and his buildings; held, his contributory negligence for the jury.

be used without fault, will relieve the company from liability for its own negligence.¹⁰ One who invites upon his premises an engine, which he knows to be defective, cannot hold the owner responsible for a fire caused by such defect.¹¹

§ 680. Negligent use of adjacent land. — The occupant of land near or even next to a railroad is not chargeable with contributory negligence, merely by reason of leaving his land in its natural state¹ or making any legitimate use of his property.² It makes no difference if, by so doing, his property may be extremely liable to take fire, in the event of the railroad trains being negligently managed.³ He is not required to anticipate such negligence,⁴ nor to give up the lawful use of

¹⁰ *Kalbfleisch v. Long Island R. Co.*, 102 N. Y. 520; 7 N. E. 557. For cases of plaintiff's negligence in leaving goods intended for shipment near track, on the right of way, without protection against fire from passing locomotives, see *St. Louis, etc. R. Co. v. Fire Ass'n*, 55 Ark. 163; 18 S. W. 43; *Gulf, etc. R. Co. v. McLean*, 74 Tex. 646; 12 S. W. 843; *Missouri Pac. R. Co. v. Bartlett*, 69 Tex. 79; 6 S. W. 549; *Texas, etc. R. Co. v. Ross*, 7 Tex. Civ. App. 653; 27 S. W. 728.

¹¹ The owners of a warehouse owned a railroad track running on their own premises near it, and employed a railroad company to send an engine to draw cars over it for their accommodation. The engine threw off sparks badly; and this they observed and complained of, but nevertheless continued to make use of it; and the warehouse was burned by sparks emitted from it. Held, that they could not recover (*Marquette, etc. R. Co. v. Spear*, 44 Mich. 169). s. p., *Dennis v. Harris*, 64 Hun, 637, *mem.*; 19 N. Y. Supp. 524 [steam hay-press; no spark-arrester]; *Holman v. Boston Land Co.*, 8 Colo. App. 282; 45 Pac. 519 [steam thrasher].

¹ *Vaughan v. Taff Vale R. Co.*, 3 Hurlst. & N. 743; and other cases, cited in note 9. s. p., as to water in an aqueduct, *Fik Hon v. Spring Val. Water Co.*, 65 Cal. 619. In *Tacoma Lumber Co. v. Tacoma* (1 Wash. St. 12; 23 Pac. 929), held, there was no evidence of contributory negligence in the fact that plaintiff cut logs in February, and allowed them to remain where cut until the following August, when they were destroyed, and that they were lying in the midst of thick brush and weeds which extended to the borders of the street where the fire originated. To same effect, *Rox v. Kelso*, 5 Wash. St. 360; 31 Pac. 973.

² *Fero v. Buffalo, etc. R. Co.*, 22 N. Y. 209; *Cook v. Champlain Transp. Co.*, 1 Denio, 91; affirmed and extended in *Kalbfleisch v. Long Island R. Co.*, 102 N. Y. 520; 7 N. E. 557.

³ *Kalbfleisch v. Long Island R. Co.*, *supra*.

⁴ *Cincinnati, etc. R. Co. v. Smock*, [Ind.]; 33 N. E. 108; following *Chicago, etc. R. Co. v. Burger*, 124 Ind. 275; 24 N. E. 981. s. p., *Briant v. Detroit, etc. R. Co.*, 104 Mich. 307; 62 N. W. 365; *Mississippi Ins. Co. v.*

his property, in such manner as would be deemed prudent under ordinary circumstances, simply because a railroad has been constructed beside his land. The fact that his building stands partly in the company's right of way, if it was placed and allowed to remain there by its license, will not exempt it from the duty of care in the operation of its locomotives.⁵ Neither will the knowledge of an adjacent land-owner, that engines on the road are habitually so mismanaged or defective as to cause frequent fires upon or near the track, make any difference. Such a fact may add to the evidence of the defendant's negligence, but cannot add to the plaintiff's duties.⁶ There are decisions and *dicta* which conflict with this view;⁷ but they are against the weight of authority, and cannot be justified on principle. Accordingly, it may be considered settled law everywhere, except in Illinois,⁸ that it is

Louisville, etc. R. Co., 70 Miss. 119; 12 So. 156. See cases cited under § 92, *ante*.

⁵ So held under the Maine statute (Sherman v. Maine Cent. R. Co., 86 Me. 422; 30 Atl. 69).

⁶ Evidence that fires on the railroad grounds were frequent does not increase the plaintiff's duty, but only tends to prove the defendant's negligence (Snyder v. Pittsburgh, etc. R. Co., 11 W. Va. 15).

⁷ Hammon v. Southeastern R. Co., Walford Railw. 183. See Smith v. Hannibal, etc. R. Co., 37 Mo. 287.

⁸ The ruling of a majority of the court, in Ohio, etc. R. Co. v. Shanefelt (47 Ill. 497), that owners of land, contiguous to railroads, were as much bound in law to keep their lands free from an accumulation of dry grass and weeds as railroad companies were, was adopted, although limited in its application, in Chicago, etc. R. Co. v. Simonson (54 Ill. 504). This Illinois doctrine has possibly been adopted in Iowa (see Kesse v. Chicago, etc. R. Co., 30 Iowa, 78), but nowhere else. It is plausible, but erroneous. The

reason why a railroad company is bound to clear its land of inflammable rubbish is that it continually carries masses of live coals over it, and is practically certain to drop red-hot cinders upon the land many times a day. When farmers do the same thing, even once a day, it will be time to hold them to the same obligation in this respect as railroad managers, but not until then. The decision was especially erroneous in Illinois, because the legislature had expressly required railroad companies thus to clear their lands, and had not required other land-owners to do so. So, leaving a house unfinished, without windows, near a railroad, was held (erroneously we think) contributory negligence (Great Western R. Co. v. Haworth, 39 Ill. 346). Plaintiff built his house at a reasonably safe distance from the track; a warehouse belonging to another near the track was set on fire from a passing engine, and communicated the fire to plaintiff's house; judgment for him was affirmed (Toledo, etc. R. Co. v. Maxfield, 72 Ill. 95).

not necessarily contributory negligence, for the occupant of land adjoining a railroad to leave dry grass, stubble, underbrush, etc., in his field,⁹ or to build on any part of his land,¹⁰ or to build a wooden house,¹¹ or cover a roof with wooden shingles,¹² or to fail to have a good roof or to keep it in repair,¹³ or

⁹ Thus, one whose woods, or crops, on land closely adjoining a railroad have been destroyed by fire from a passing engine, is not deprived of remedy by the fact that he allowed underbrush, dry grass, stubble and other combustible vegetation to remain in a very dry season (*Vaughan v. Taff Vale R. Co.*, 3 Hurlst. & N. 743; *Fitch v. Pacific R. Co.*, 45 Mo. 322; *Flynn v. San Francisco, etc. R. Co.*, 40 Cal. 14.) The first case was reversed on other grounds (5 H. & N. 679); but the plaintiff finally recovered his damages (see *Freemantle v. London & North-western R. Co.*, 10 C. B. N. S. 89). "A person owning land near a railroad is not obliged to keep the leaves falling from his trees, from being carried by the wind to such railroad, nor to keep his lands clear of leaves and dry grass or weeds or other combustible matter" (*Salmon v. Delaware, etc. R. Co.*, 38 N. J. Law, 5; s. c., 39 Id. 299; followed in *Snyder v. Pittsburgh, etc. R. Co.*, 11 W. Va. 14; *Phila., etc. R. Co. v. Schultz*, 93 Pa. St. 341; *Pittsburgh, etc. R. Co. v. Jones*, 86 Ind. 496; *Chicago, etc. R. Co. v. Smith*, 6 Ind. App. 262; 33 N. E. 241; *Mathews v. St. Louis, etc. R. Co.*, 121 Mo. 298; 24 S. W. 591; *Kendrick v. Towle*, 60 Mich. 363; 27 N. W. 567). In Virginia, the Illinois rule was directly repudiated, in a case where plaintiff's land was covered with dry grass and broom-sedge, in the same manner as the company's right of way (*Richmond, etc. R. Co. v. Medley*, 75 Va. 499). See, also, *Palmer v. Mo. Pacific R.*

Co., 72 Mo. 217; *Louisville, etc. R. Co. v. Krimming*, 87 Ind. 351; *Pittsburgh, etc. R. Co. v. Hixon*, 79 Ind. 111; *Bryant v. Central, etc. R. Co.*, 56 Vt. 710; *Erd v. Chicago, etc. R. Co.*, 41 Wisc. 65; *Kellogg v. Chicago, etc. R. Co.*, 26 Id. 223; *Gulf, etc. R. Co. v. Lowe*, 2 Tex. App. Civ. Cas., §§ 648, 650.

¹⁰ *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Burke v. Louisville, etc. R. Co.*, 7 Heisk. 451 [plaintiff built house thirty yards from railroad and roofed it with cypress shingles]; *Jacksonville, etc. R. Co. v. Peninsular Land Co.*, 27 Fla. 1; 9 So. 661; *Cincinnati, etc. R. Co. v. Barker*, 94 Ky. 71; 21 S. W. 347. It is not contributory negligence not to remove a barn, which was one hundred feet from the track (*Caswell v. Chicago, etc. R. Co.*, 42 Wisc. 193). Compare *Hill v. Ontario, etc. R. Co.* 13 Upper Canada [Q. B.], 503. One is not negligent in erecting a building only fifteen feet from defendant's warehouse, which he knew contained inflammable oils, when he could have built thirty feet further away (*Waters-Pierce Oil Co. v. King* [Tex. Civ. App.], 24 S. W. 700).

¹¹ *Briant v. Detroit, etc. R. Co.*, 104 Mich. 307; 62 N. W. 365.

¹² *Burke v. Louisville, etc. R. Co.*, *supra*; *Alpern v. Churchill*, 53 Mich. 607; 19 N. W. 549.

¹³ *Philadelphia, etc. R. Co. v. Hendrickson*, 80 Pa. St. 182. To same effect, in Delaware (*Jefferis v. Philadelphia, etc. R. Co.*, 3 Houst. 447).

to leave doors and windows open,¹⁴ or a board off the wall.¹⁵

§ 681. [consolidated with § 680].

§ 682. [consolidated with § 679].

¹⁴ Chicago, etc. R. Co. v. Simonson, 54 Ill. 504. So held, where only one pane of glass was out (Martin v. Western Un. R. Co., 23 Wisc. 437). Whether, by leaving his door open, facing the railroad, *with combustible material inside*, the plaintiff was culpably negligent, has been held a question for the jury (Fero v. Buffalo, etc. R. Co., 22 N. Y. 209; Ross v. Boston & Worcester R. Co., 6 Allen, 87). See also Garrett v. Chicago, etc. R. Co., 36 Iowa, 121; Tanner v. N. Y. Central R. Co., 108 N. Y. 623; 15 N. E. 379.

¹⁵ Chicago, etc. R. Co. v. Burger, 124 Ind. 275; 24 N. E. 981; followed, Cincinnati, etc. R. Co. v. Smock, [Ind. Sup.], 33 N. E. 108.

CHAPTER XXXIV.

EXPLOSIVES, MACHINERY, AND MISCELLANEOUS CASES.

§ 683. Management of machinery.	688. Negligent use of fire-works, etc.
684. Who may complain of negligent management.	688 <i>a</i> . Blasting.
685. Statutory duty to fence machinery.	689. Storing of dangerous material.
686. Negligent use of fire-arms, etc.	690. Vendors and bailors of dangerous material.
687. [Consolidated with § 686].	691. Pharmacists, opticians, etc.

§ 683. **Management of machinery.** — Every one owning or using machinery, which is or may become dangerous, is bound to take such precautions as reasonable care would suggest, to prevent it from injuring persons who are rightfully in its vicinity,¹ either by fencing it or stationing some capable person to watch it.² Hence one who is engaged in a business which naturally draws numbers of people in a public place is liable for an injury through the use of machinery so defective as to be imminently dangerous to human life;³ and, providing he was not in fault for being there at all, a person so injured is not barred of a recovery by the fact that he was at the place solely to gratify his curiosity.⁴ Persons who are invited to use a machine have a right to recover from the person giving the invitation for an injury that they suffer in consequence of its unfitness for the work, or of its imperfect construction, if the latter person was aware of the danger to which any one so using

¹ We speak here only of injuries to persons other than employees engaged in working the machine. An employer's liability for breach of duty to provide and maintain suitable instrumentalities for his employees, is stated in § 194 *et seq.*, *ante*.

Co., 29 Conn. 548; *Mullaney v. Spence*, 15 Abb. N. S. 319; *Keffe v. Milwaukee R. Co.*, 21 Minn. 207.

³ *Fitzpatrick v. Garrison Ferry Co.*, 49 Hun, 288; 1 N. Y. Supp. 794.

⁴ *Fitzpatrick v. Garrison Ferry Co.*, *supra*. See "turn-table" cases, § 73, *ante*; also cases cited in notes 6, 7,

² See *Hayden v. Smithville Mfg.* 8, § 705, *post*.

the machine was exposed, or if he was culpably negligent in constructing it.⁵ If steam or any other explosive force is used to propel machinery, the person using it is liable to every one injured in person or property by an explosion occurring through want of ordinary care in the management of the boiler⁶ or any other part of the machinery; but he does not guarantee the safety of the boiler.⁷ He is certainly not liable for latent defects in newly purchased machinery, not discoverable on such reasonable examination as was possible without tearing the machine to pieces.⁸ Steam boilers should be inspected at reasonably frequent intervals, by a competent inspector;⁹ although the mere fact that the boiler was inspected

⁵ Cowley v. Sunderland, 6 Hurlst. & N. 565.

⁶ Spencer v. Campbell, 9 Watts & S. 32. In Massachusetts, one who violates the statute forbidding the erection of a steam engine within five hundred feet of a dwelling-house, is liable for the damages caused by an explosion (Quin v. Lowell Electric Light Co., 140 Mass. 106).

⁷ Marshall v. Welwood, 38 N. J. Law, 339; see Jaffe v. Harteau, 56 N. Y. 398. Plaintiff cannot recover in the absence of proof that the defect causing explosion was known to defendant or was discoverable by inspection (Losee v. Buchanan, 51 N. Y. 476). The fact of an explosion does not raise a presumption of negligence (Huff v. Austin, 46 Ohio St. 386; 21 N. E. 864; Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228; 33 Atl. 1104; Olive v. Marble Co., 103 N. Y. 293; 8 N. E. 552). s. p., Cosulich v. Standard Oil Co., 122 N. Y. 118; 25 N. E. 259; rev'g 55 N. Y. Superior, 384, where it was held that an explosion of an overheated and overpressed iron boiler in close proximity to large oil-tanks was in itself *prima facie* evidence of negligence on the part of those operating it. In Perkins v. Eighmie (53 Hun, 634, *mem.*; 6 N. Y. Supp. 156), no defect

had been observed in the boiler until the day before the explosion, when a slight leak was noticed. A workman was immediately employed to remedy the defect, and while the boiler was in his hands the explosion occurred. Held, no negligence shown.

⁸ Richmond, etc. R. Co. v. Elliott, 149 U. S. 266; 13 S. Ct. 837 [explosion].

⁹ Egan v. Dry Dock, etc. R. Co., 12 N. Y. App. Div. 556; 42 N. Y. Supp. 188. In that case, the explosion occurred at a point where the outer surface of one side of the boiler had become extremely thin from corrosion. About six months previous to the explosion, a hydrostatic test, made pursuant to statute (L. 1882, c. 410, § 310), had been applied to the boiler, which resulted in the issuance of a certificate for its use at a pressure about thirty pounds in excess of that which it registered five minutes before the explosion. Plaintiff claimed that the "hammer test" should have been employed and would have revealed the defect. Held, the burden rested upon plaintiff to show that no proper test was made, and what was a proper method of testing the boiler rested with the jury.

and approved by an official inspector, as required by statute, does not of itself establish that the owner has performed his common-law duty of care in its maintenance.¹⁰

§ 684. Who may complain of negligent management.—

Where dangerous machinery is in operation, in full view, one who has a mere license to pass over the premises must choose a path (if there is one) quite out of the range of such machinery, even though it be not so convenient as the more dangerous path; and he cannot recover for an injury which he might thus have avoided; for he has no right to require a fence to be put around the machinery for his benefit.¹ Nor, if a fence is put up, can he complain of its insufficiency, unless its defects were of a nature that did, and well might, mislead him into thinking it safe.² It was once held that, where a machine was not in motion and could do no injury while quiescent, its owner was not liable for the damage done thereby to one who wantonly set it in motion; and this, even though the machine was left unwatched in a public place, and though the injured person was a very young child.³ But this has been practically and properly overruled.⁴

§ 685. Statutory duty to fence machinery. — In England,¹ and generally in this country,² mill-owners are required by statute to fence all their mill-gearing, and certain other parts of their machinery, while in motion for manufacturing purposes.

¹⁰ *Egan v. Dry Dock, etc. R. Co., supra.* But the omission of all previous inspection of the boiler, as required by law, casts upon the defendant the burden of showing that such omission did not contribute to the explosion (*Van Norden v. Robinson*, 45 Hun, 567).

¹ No one is bound to fence his dangerous machinery in favor of a person on the premises as a mere licensee (*Matthews v. Bonsee*, 51 N. J. Law, 30; 16 Atl. 195).

² *Bolch v. Smith*, 7 Hurlst. & N. 736.

³ *Mangan v. Atterton*, L. R. 1 Ex. 239.

⁴ *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, 338.

¹ Stat. 7 & 8 Vict. c. 15, § 21. As to the places which must be fenced, see *Britton v. Great Western, etc. Co.*, L. R. Ex. Ch. 130.

² The New York statute (L. 1890, c. 398, § 12), imposing a penalty on the owner of factories in which women are employed for failure to cover cogwheels, does not prevent a woman from assuming the obvious risks from uncovered cogwheels (*Knisley v. Pratt*, 148 N. Y. 372; 42 N. E. 936).

Although the English statute purports to be for the protection of "children and young persons," yet its language, in respect to this particular duty, is sufficiently broad to entitle all persons employed in mills to its benefits,³ but, unless the intention of a statute or ordinance is clearly otherwise, only employees are entitled to the protection afforded.⁴ And although the statute imposes a penalty for the violation of its provisions, yet this is not the only remedy left to an injured party. The omission to have a fence where it is required is an act of negligence, for which damages may be recovered, irrespective of the penalty.⁵ The requirement of the statute being absolute, it is no defense to show that fencing would not have lessened the danger of the particular machinery in question.⁶ But if it was in use for any other than manufacturing purposes, the absence of a fence is no ground of complaint under the statute,⁷ whatever it may be at common law. And the statute does not exclude the defence of contributory negligence. One who, knowing that the machinery is unfenced, carelessly gets in its way, cannot recover for his injury.⁸

§ 686. Negligence in use of fire-arms.—The common use of fire-arms by people of all classes and ages, which is characteristic of this country, has of course led to the infliction of a vast number of injuries from negligence in their use; but for various reasons, the number of litigated cases arising out of such injuries have been comparatively few; and the number of cases presenting any question of law which could make them worthy of report, are still fewer. A very high degree of care

³ *Coe v. Platt*, 6 Exch. 752.

⁴ *Gibson v. Leonard*, 143 Ill. 182; 32 N. E. 182.

⁵ *Caswell v. Worth*, 5 El. & Bl. 849, per Coleridge and Crompton, JJ.

⁶ *Doel v. Sheppard*, 5 El. & Bl. 856. Under an Iowa statute, which required the tumbling-rod of threshing machines to be boxed, held, that a violation of the statute constituted negligence (*Messenger v. Pate*, 42 Iowa, 443).

⁷ *Coe v. Platt*, 6 Exch. 752; 7 Id. 460.

⁸ *Caswell v. Worth*, 5 El. & Bl. 849;

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Doel v. Sheppard, Id. 856. In the first case, Coleridge, J., said: "The statute makes the omission of a certain act illegal, and subjects the parties omitting it to penalties. But there can be no doubt that a party receiving bodily injury through such omission has the right of suing at common law. The action, however, must be subject to the rules of common law; and one of those is that a want of ordinary care, or willful misconduct, on the part of the plaintiff, is an answer to the action."

is required from all persons using fire-arms in the immediate vicinity of other people, no matter how lawful, or even necessary, such use may be.¹ For one to draw and present a loaded pistol, with the intention of using it, in a room where many persons are present, is such recklessness as will make him liable to one injured by its discharge, though not the person intended to be injured.² Not only does the infliction of a wound upon the person,³ or a breach in the property of another, constitute an actionable injury; but an action will

¹Weaver v. Ward, Hob. 134 [accidental injury by soldier discharging his gun while at drill; actionable]; Castle v. Duryee, 1 Abb. Ct. App. 327 (note 2, § 332, *ante*). See Moody v. Ward, 13 Mass. 299; McClenaghan v. Brock, 5 Rich. Law, 17; Priester v. Angley, 5 Id. 44; Haack v. Fearing, 5 Robertson, 528; Bethel v. Otis, 92 Iowa, 502; 61 N. W. 200; Knott v. Wagner, 16 Lea. 481; 1 S. W. 155 [no directions or suggestions from plaintiff to defendant can be construed into a license justifying the latter so as to amount to contributory negligence in plaintiff]. In Moebus v. Becker (46 N. J. Law, 41), while one of two hunters was sitting on a fence, his gun was discharged either by the rail turning or by his pointing it at his companion, wounding him. Held, question of negligence for jury. Where one of two hunters is walking in advance of the other, the latter is bound to so carry his gun that in the event of its accidental discharge the former will not be injured (Winans v. Randolph, 169 Pa. St. 606; 32 Atl. 622). s. p., McCleary v. Frantz, 160 Pa. St. 535; 28 Atl. 929; Whitten v. Hartin, 163 Mass. 39; 39 N. E. 412 [defendant shot plaintiff in mistake for a partridge; verdict for plaintiff sustained]. In Hankins v. Watkins (77 Hun, 360; 28 N. Y. Supp. 867), defendant while hunting shot another of whose presence he was ignor-

ant, in mistake for a deer. Held, liable and question of intent was immaterial [text quoted and approved]. See §§ 16, 17, 19, *ante*.

²Chiles v. Drake, 2 Metc. [Ky.] 146. It is actionable negligence for one, while adjusting the hammer of a loaded revolver, to hold it so that an accidental discharge would injure another (Judd v. Ballard, 66 Vt. 668; 30 Atl. 96). Not so, where defendant did not see plaintiff, or point the pistol at him (Sutton v. Bonnett, 114 Ind. 243; 16 N. E. 180).

³Trespass lies against the master of a steamboat for injury done to another by the discharge of a gun on board, by his command and in his presence, though the injury resulted from a want of due care merely (Rhodes v. Roberts, 1 Stew. [Ala.] 415). So a steamship is liable, in admiralty, to one on board another vessel lying alongside, who was injured in the ear by the concussion of a cannon, fired aboard the steamship to indicate her departure for sea (The Barracouta, 39 Fed. 428). Case, not trespass, was held to be the proper action against one who discharged a musket at a vessel, and wounded the master, whereby the intended voyage was defeated, and the owners of the vessel subjected to loss (Adams v. Hemmenway, 1 Mass. 145). See Dalton v. Favour, 3 N. H. 465; Moseley v. Jamison, 66 Miss. 52; 5 So. 524 [intentional shooting].

also lie for injury suffered from the fright naturally caused by the discharge of a gun under circumstances making it improper to fire it.⁴ It may be actionable negligence to have a loaded gun where it can be got at by a child; and it is certainly negligent to intrust such a gun to one incompetent to handle it.⁵ If a person is injured by the discharge of a gun in the hands of one who has entire control of it, the burden is on the latter to prove that the gun was not fired at the wounded person, either intentionally or negligently, but that the result was without fault on his part.⁶

§ 687. [consolidated with § 686].

§ 688. Negligent use of fire-works.—The discharge of fire-works of every kind, in all kinds of places, and with a total disregard of comfort, convenience, and safety of every one not engaged in the same patriotic work, is a well-known feature of our great national anniversary. If custom could sanction anything inherently unreasonable and reckless, such sanction might be well claimed for this practice, which has now prevailed for more than a century, during all which time the precedent has been honored by a strict observance. But the law, preferring common sense to precedent, does not admit of any excuse for such conduct upon this ground; and every one who

⁴ *Cole v. Fisher*, 11 Mass. 137 [horse frightened by discharge of gun in highway]. In *Renner v. Canfield*, (36 Minn. 90; 30 N. W. 435), defendant, while on the highway near plaintiff's house, shot and killed a dog. Plaintiff's wife, who, without the knowledge of defendant, stood near by and saw the shooting, was so frightened by the occurrence as to become seriously ill. Held, that the mere killing of the dog was not the proximate cause of the injury, but negligence in shooting it in such close proximity to plaintiff's house as might naturally and reasonably be likely to injure the inmates.

⁵ *Dixon v. Bell*, 5 Maule & Sel. 198; *King v. Ford*, 1 Stark. 421 [school master permitted pupils to

use fireworks]. One who sells toy-pistol cartridges to a young boy, knowing them to be dangerous, and that the boy was unfit to be entrusted with them, is liable for the consequences (*Binford v. Johnston*, 82 Ind. 426; see *Carter v. Towne*, 98 Mass. 567 [sale of gunpowder]); but plaintiff must show that the accident ought to have been anticipated by defendant as a probable result of the sale (*Poland v. Earhart*, 70 Iowa, 285; 30 N. W. 637).

⁶ *Atchison v. Dullam*, 16 Ill. App. 42; *Morgan v. Cox*, 22 Mo. 373; *Tally v. Ayres*, 3 Sneed, 677; *Chataigne v. Bergeron*, 10 La. Ann. 699. s. p., *Dowell v. Guthrie*, 99 Mo. 653; 12 S. W. 900 [negligent discharge of fireworks].

indulges himself, even on the Fourth of July, in the discharge of fire-works in a highway or any place to which he has not a private right, is liable for any injury thereby caused to another.¹ It has been held that one who merely permits an exhibition of fire-works on his own premises without himself or his agents taking any part in their purchase or discharge is not liable either for the inferior quality of the fire-works or for the negligent manner in which they are handled by the licensee.² The mere presence of plaintiff, as a spectator, at a display of fire-works does not make him a joint wrongdoer or guilty of contributory negligence.³ The leaving of an unexploded signal torpedo upon a railway track at a road crossing, is such negligence as will render the company liable for the consequences of its explosion.⁴ And it is familiar law that one who lights a squib or other fire-work, and throws it where it causes danger to another, is liable to any one ultimately injured by its explosion, though it be thrown from one person to another for any number of times.⁵

§ 688a. Blasting.—The rule is universal that one who, by blasting upon his own land, causes rocks or other physical objects to be thrown upon an adjacent highway, or upon land of another, causing injuries to persons or property, is guilty of

¹ Cases cited in note 11, § 355, *ante*. In *Colvin v. Peabody* (155 Mass. 104; 29 N. E. 59), held, that a finding that defendant (who had contracted with a city for fire-works on the Fourth) was negligent in discharging fire-works was warranted, on proof that the mortars were discharged in too small an inclosure for perpendicular firing; that insufficient time was taken for preparation; and that, although bombs, when carefully fired, would not fall on the spectators, the one that struck plaintiff fell at a place far from where it was safe for it to fall. See *Dowell v. Guthrie*, 99 Mo. 653; 12 S. W. 900; *Mullins v. Blaise*, 37 La. Ann. 92. As to liability of city for licensing use of streets for firing cannon or

discharging fireworks, see cases cited in note 14, § 358, and in note 4, § 263; and for not enforcing ordinances against such use, see cases cited in note 23, § 262.

² *Waixel v. Harrison*, 37 Ill. App. 323.

³ *Colvin v. Peabody*, 155 Mass. 104; 29 N. E. 59; *Dowell v. Guthrie*, 99 Mo. 653; 12 S. W. 900; see *Conklin v. Thompson*, 29 Barb. 218.

⁴ *Harriman v. Pittsburgh, etc. R. Co.*, 45 Ohio St. 11; 12 N. E. 451; *Carter v. Columbia, etc. R. Co.*, 19 S. C. 20; *Powers v. Harlow*, 53 Mich. 507; 19 N. W. 257.

⁵ *Scott v. Shepard*, 2 W. Blacks. 892; 3 Wils. 403. See § 37, note 3, *ante*.

a trespass, and is liable for the injuries inflicted, without proof of negligence on his part either in charging or in firing the blast.¹ But where the injury was not occasioned by contact with a physical object thus thrown, but by the shaking of the earth, or the vibration of the air, it is settled, in New York at least, that a trespass cannot be predicated, and that to warrant a recovery for injuries caused thereby, plaintiff must show some negligence in the process of blasting which proximately caused the injury.² And such negligence is shown by the occurrence of violent and long-continued concussions of the air, breaking windows, loosening walls, etc., of an adjoining building, where a less powerful explosive, or smaller charges would have answered the purpose.³ The hurling of a rock by a blast three times the usual distance is such evidence of negligence as calls for proof that the defendant was without fault;⁴ and the facts that no means were taken to restrict the flight of rocks to safe limits, or that no notice of danger was given make a *prima facie* case of negligence.⁵ Of course, a

¹ Hay v. Cohoes Co., 2 N. Y. 159; Tremain v. Cohoes Co., Ib. 163; St. Peter v. Denison, 58 Id. 416; Colton v. Onderdonk, 69 Cal. 155; 10 Pac. 395; Munro v. Pac Coast Dredging Co., 84 Cal. 515; 24 Pac. 303. "One who, in the process of blasting upon his land adjoining the highway, inflicts physical injuries upon one lawfully on the highway by throwing stones, wood or other objects from the blast against the person of the traveler, is a wrongdoer, and responsible as such, no matter how carefully the blasting is carried on" (per Bartlett, J., Sullivan v. Dunham, 10 N. Y. App. Div. 438; 41 N. Y. Supp. 1083). s. p., Wright v. Compton, 53 Ind. 337; Beauchamp v. Saginaw Min. Co., 50 Mich. 163; 15 N. W. 65.

² Booth v. Rome, etc. R. Co., 140 N. Y. 237; 35 N. E. 592; Benner v. Atl. Dredging Co., 134 N. Y. 156; 31 N. E. 328; rev'g 58 Hun, 359; 12 N. Y. Supp. 181. In Mitchell v. Prange (Mich. ; 67 N. W. 1096), plaintiff was injured by a kick from

a horse which became frightened at the noise of a blast in the street made by direction of city. Held, no liability for noise made, in absence of showing necessity of making less. In view of the absence of an adequate legal remedy for injuries so caused, equity intervened in Hill v. Schneider (13 N. Y. App. Div. 299; 43 N. Y. Supp. 1) by enjoining the further prosecution of blasting, which was shaking down plaintiff's house.

³ Morgan v. Bowes, 62 Hun, 623; 17 N. Y. Supp. 22; Newell v. Woolfolk, 91 Hun, 211; 36 N. Y. Supp. 327. As to negligence in employing an incompetent contractor to blast, see Berg v. Parsons, 84 Hun, 60; 31 N. Y. Supp. 1091.

⁴ Klepsch v. Donald, 8 Wash. St. 162; 35 Pac. 621; Simmons v. McConnell, 86 Va. 494; 10 S. E. 838 [blast fired a stone 600 feet; nonsuit refused].

⁵ Blackwell v. Lynchburg, etc. R. Co., 111 N. C. 151; 16 S. E. 12; Gates v. Latta, 117 N. C. 189; 23 S. E.

person who is warned that a blast is about to be made, cannot voluntarily remain in a place of danger without losing his right of action if injured.⁶

§ 689. **Storing of dangerous materials.**—The owner or controller of dangerous goods, such as gunpowder and other explosives, who keeps them on his premises, does so at his own peril, and he is bound to exercise great care to prevent an injury which a prudent man would reasonably foresee might result therefrom.¹ It is not always, however, a question of due care. Whether the keeping of gunpowder or other explosives upon private premises constitutes a nuisance depends upon the locality, the quantity, and the surrounding circumstances, without regard to the question whether it was kept carelessly or negligently.² It is clear, however, that a bailee of

173; *Harris v. Simon*, 32 S. C. 593; 10 S. E. 1076 [question of warning for jury]. See *Mitchell v. Prange*, Mich. ; 67 N. W. 1096. In *Brannock v. Elmore* (114 Mo. 55; 21 S. W. 451), held, that a violation of ordinance forbidding blasting without first covering the rock with timber was of itself sufficient to justify a verdict, citing § 13, *ante*. See *Hare v. McIntire*, 82 Me. 240; 19 Atl. 453 [action under statute requiring warning to be given]; *Wadsworth v. Marshall*, 88 Me. 263; 34 Atl. 30 [same].

⁶ *Sullivan v. Dunham*, 10 N. Y. App. Div. 438; 41 N. Y. Supp. 1083; *Graetz v. McKenzie*, 9 Wash. St. 696; 35 Pac. 377. See *Brannock v. Elmore*, 114 Mo. 55; 21 S. W. 451.

¹ See cases cited under § 60, *ante*. A presumption of negligence arises from the fact of an explosion in a dynamite manufactory, where there is evidence that, if dynamite is carefully handled, it will not explode (*Judson v. Giant Powder Co.*, 107 Cal. 549; 40 Pac. 1020 [§ 60, *ante*, quoted and approved]). There held, also, that plaintiff in conveying the

land to defendant for use as a dynamite factory, did not assume the risk of explosion; nor did his continuing his place of business near by, after one explosion occurred, prevent his recovery for injury to such place. In *Clarkin v. Biwabik-Bessemer Co.* (65 Minn. 483; 67 N. W. 1020), the owner of premises whereon dynamite was stored was held liable for damages to the property of one occupying the property as a bare licensee, caused by an explosion of the dynamite as a result of the owner's want of ordinary care and skill in its management. As to the liability of a landlord to one of several tenants of the same building for an explosion of gasoline used by another tenant, see *Lewis v. Hughes*, 12 Colo. 208; 20 Pac. 621.

² It is therefore error to charge that defendant is entitled to a verdict, unless the jury find that defendant carelessly or negligently kept the gunpowder on his premises (*Heeg v. Licht*, 80 N. Y. 579). "If actual injury results from the keeping of gunpowder, the person keeping it will be liable therefor, even

goods, of the explosive nature of which he had no knowledge, is bound to use only ordinary care in reference to them: having used that care, he is not responsible for the consequence of an explosion.³

§ 690. Vendors and bailors of dangerous material.—

The mere possession of poison, or any other dangerous thing, involves no liability for its use by a person who had no right to touch it.¹ But all persons who deal with deadly poisons are held to a strict accountability for their use. The highest degree of care known among practical men must be used to prevent injury from the use of such poisons.² And one who sells a poison, labeled (by his culpable negligence) as an innocent drug, is liable to any person injured thereby, no matter through how many hands it may have passed.³ In some states, the selling of

though the explosion is not chargeable to his personable negligence" (*Laffin, etc. Powder Co. v. Tearney*, 131 Ill. 322; 23 N. E. 389; and cases cited; see former opinion in S. C., 21 N. E. 516). *s. p.*, *Wilson v. Phoenix Powder Co.*, 40 W. Va. 413; 21 S. E. 1035. See *Comminge v. Stevenson*, 76 Tex. 642; 13 S. W. 556 [evidence insufficient to show powder magazine a nuisance]. In *Lee v. Vacuum Oil Co.* (54 Hun, 156; 7 N. Y. Supp. 426), held, defendant not liable as for a nuisance in permitting naphtha to stand in pipes, when pumps were not working, so that it leaked and exploded, but he was liable for negligence in not before discovering break in pipe.

³ *Parrot v. Wells*, 15 Wall. 524 [nitro-glycerine case]; *Walker v. Chicago, etc. R. Co.*, 71 Iowa, 658; 33 N. W. 224 [car load of dynamite standing in yard awaiting owner's orders; no negligence shown]. See *Birmingham Water-Works Co. v. Hubbard*, 85 Ala. 179; 4 So. 607 [dynamite explosion].

¹ *Callahan v. Warne*, 40 Mo. 131.

² *Ryall v. Kennedy*, 40 N. Y. Superior, 347; *Kennedy v. Ryall*, 67

N. Y. 379 [steward of vessel liable for allowing the exposure of poisonous fumigating liquid]; *Spelman v. Fisher*, 56 Barb. 151; *Davis v. Guarnieri*, 45 Ohio St. 470; 15 N. E. 350; *Davidson v. Nichols*, 11 Allen, 514; *Nichols v. Smith*, 115 Mass. 332; *Allison v. Western, etc. R. Co.*, 64 N. C. 382; *Smith v. Hays*, 23 Ill. App. 244; *Brunswick v. White*, 70 Tex. 504; 8 S. W. 85; and all cases cited under § 117, *ante*. The sale of chloroform to a minor of years of discretion is not the proximate cause of his death from the use of the chloroform, though he was grossly intoxicated at the time (*Meyer v. King*, 72 Miss. 1; 16 So. 245). Such intoxication is sufficient to support the defense of contributory negligence (*Ib*). Plaintiff must show himself not guilty of contributory negligence (*Rabe v. Sommerbeck*, 94 Iowa, 656; 63 N. W. 458).

³ *Thomas v. Winchester*, 6 N. Y. 297; *Norton v. Sewall*, 106 Mass. 143; *Callahan v. Warne*, 40 Mo. 131; *Howes v. Rose*, 13 Ind. App. 674; 42 N. E. 303 [second vendee liable to his vendee].

poison without labeling it as such is made a criminal offense.⁴ The principle which determines the liability of a vendor of dangerous goods applies to any one who puts in the charge of another, as carrier, depositary, or otherwise, anything which he knows to be of a dangerous nature, liable to injure other goods by explosion, corrosion, combustion, leakage, or the like, is bound to give the person with whom such things are deposited reasonable notice of the danger; and if he fails to do so, he is liable for all damage that may be done thereby to the persons or property of others, coming without their fault into dangerous contact with the thing, while its nature remains unknown to the persons having it in charge.⁵ If the thing is an ordinary article of merchandise, the qualities of which are generally known, such as gun-powder, gun-cotton, nitric acid, nitroglycerine, etc., a simple disclosure of the name of the article is sufficient notice of its nature; but if the thing is new in the market, or if its dangerous qualities are not common to its species, further warning is necessary.⁶ Thus, while in shipping

⁴ As in *New York (Rev. Stat. 694, § 23)*. Yet one selling it without a label, but warning the purchaser of its character, is not liable civilly, where the purchaser fails to heed the warning and takes an overdose of the poison (*Wohlfahrt v. Beckert*, 92 N. Y. 490). See *Fisher v. Golladay*, 38 Mo. App. 531.

⁵ Thus, where a substance was shipped under the name of bleaching powder, which was in fact mainly chloride of lime, the shipper was held liable for damage done to other goods on board by the fumes of the powder (*Brass v. Maitland*, 6 El. & B. 470). So where defendant gave a carrier's servant a carboy of nitric acid, marked "acid" only, and the servant was injured by the explosion of the acid, held, defendant was liable for the injury (*Farrant v. Barnes*, 11 C. B. N. S. 553). In *Gould v. Slater Woolen Co.* (147 Mass. 315; 17 N. E. 531), defendant used a common mordant in

dying cloth, by handling which a purchaser was poisoned. The mordant was not at that time known to be poisonous to handle, the injury in question being the first instance known. Held, defendant was not negligent as to any duty he owed to the purchaser.

⁶ In *Standard Oil Co. v. Tierney* (92 Ky. 367; 17 S. W. 1025), a quantity of naphtha placed in a car by a shipper and billed as "carbon oil" was branded, "Unsafe for illuminating purposes." On the trip, the conductor entered the car with a lantern to stop a leak, and while so engaged was injured by an explosion. Held, the shipper was bound to so mark the barrels that the employees of the carrier, in the exercise of ordinary prudence, would ascertain the explosive nature of the goods; and whether the brand was sufficient for this purpose was a question for the jury. Branding a barrel of gasoline as "purline," held, not

a tiger no warning could be required, the viciousness of a horse, disposed to kick or bite, ought to be clearly stated to the carrier. It is not necessary, in order to maintain an action on this ground, to show that the person so delivering the property made any false representation, or intended any fraud;⁷ but it must be shown that he knew the dangerous nature of the thing,⁸ and that the person receiving it neither knew it, nor was put upon inquiry with the means of knowledge.⁹

§ 691. Pharmacists, opticians, etc.—The liability of one who is employed in the business of mixing or compounding drugs for medicine, whether on prescription or otherwise, is the same as that of professional persons generally, whose employment calls for special knowledge and skill, which they are bound to have and to use; and hence it depends upon negligence, not on a mere breach of warranty of the thing sold.¹ It has been held in Kentucky that a druggist who, by mistake, mixes poisons with a harmless drug is absolutely liable for the consequences, notwithstanding any degree of care he may have used;² but elsewhere the rule is that actual negligence must be shown to warrant a recovery.³ On this principle, the liability of an optician for a negligent departure from the terms of a prescription in the grinding of eye-glasses, whereby the purchaser's eyes are injured, is not based upon an implied breach of warranty, but on negligence.⁴

negligence, where the difference in the dangerous character and in the use of the two fluids is hardly measurable or perceptible (*Socola v. Chess Carley Co.*, 39 La. Ann. 344; 1 So. 824).

¹ *Brass v. Maitland*, 6 El. & B. 470; *Farrant v. Barnes*, *supra*.

² *Williams v. East India Co.*, 3 East, 192; see *Akers v. Overbeck*, 18 N. Y. Misc. 198; 41 N. Y. Supp. 382.

³ See *Brass v. Maitland*, *supra*; *Baily v. Merrell*, 3 Bulstr. 94.

⁴ *Allan v. State S. S. Co.*, 132 N. Y. 91; 30 N. E. 482; *Thomas v. Winchester*, 6 N. Y. 397. Therefore, evidence that he was a careful and prudent man in handling medicines and poisons is not admissible in de-

fense (*Hall v. Rankin*, 87 Iowa, 261; 54 N. W. 217). And they are bound to employ competent assistants (*Smith v. Hays*, 23 Ill. App. 244).

² *Fleet v. Hollenkemp*, 13 B. Monr. 219.

³ A charge that defendant is liable without regard to negligence or legal fault is error (*Brown v. Marshall*, 47 Mich. 576; 11 N. W. 392; *Gwynn v. Duffield*, 66 Iowa, 708; s. c., 61 Id. 64; *Beckwith v. Oatman*, 43 Hun, 265; *Allan v. State S. S. Co.*, 132 N. Y. 91; 30 N. E. 482; *Howes v. Rose*, 13 Ind. App. 674; 42 N. E. 303). The text quoted and approved in *Walton v. Booth*, 34 La. Ann. 913.

⁴ *Price v. Ga Nun*, 11 N. Y. Misc. 74; 32 N. Y. Supp. 801.

CHAPTER XXXV.

GAS AND ELECTRICAL WORKS.

§ 692. Duty in construction and manufacture.	§ 696. Defense of contributory negligence.
693. Duty of inspection and repair.	697. Negligence of company's servants.
694. [Consolidated with § 693].	698. Electrical works.
695. Contributory act of stranger.	

§ 692. **Duty in construction and manufacture.** — It is the duty of a gas company to build all its works, lay its pipes, and carry on its business, in such manner as to avoid injury to the property of others by the escape of gas, or of any of the materials employed in making it, or of the washings and refuse. To this end, the company is bound to use a degree of care and skill proportioned to the danger reasonably to be anticipated, which it is its duty to avoid.¹ It is the duty of the manufacturer to dispose of the refuse and foul water coming from his works, so as to prevent their entering upon adjacent land, and for failure to do so, whereby an injury is done, he is liable as for negligence (of which, the escape of such noxious matter is sufficient proof²), or for maintaining a nuisance, and this, without proof of negligence on his part.³ The pipes, when

¹ *Hipkins v. Birmingham Gas Co.*, 6 Hurlst. & N. 250. See *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257. Gas works are to be placed in the class of private erections which are not within the ordinary and usual purposes to which real estate is applied, and whenever they create a special injury, they are to be regarded as a private nuisance for which an action will lie" (*Carhart v. Auburn Gas Co.*, 22 Barb. 297, 312). A gas company must use reasonable and ordinary care in laying its pipes and mains so as to prevent escape of

gas in dangerous quantities in view of its occupancy of streets for its special and extraordinary use in conducting an article in a high degree inflammable and explosive" (*Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 N. E. 1113).

² *Pensacola Gas Co. v. Pebley*, 25 Fla. 381; 5 So. 593.

³ The rule of liability, irrespective of negligence, for keeping intrinsically dangerous things, is stated and illustrated in § 17, *ante*, and §§ 701*a*, 728, *post*.

laid, should be sufficiently strong and securely jointed to stand ordinary frosts⁴ and to bear all pressure that can be reasonably anticipated from the ordinary use of the streets under which they are placed,⁵ as well as the degree of pressure of any gas allowed to flow through them.⁶ When licensed to use a highway or public place for laying pipes or placing other apparatus, the company is bound, like other licensees, to provide against their being or becoming, by lack of proper supervision, a cause of injury to travelers.⁷

§ 693. **Duty of inspection and repair.** — A gas company is liable for injuries caused by gas escaping from a defective pipe, meter or other apparatus, owned or controlled by it, if it knew or ought to have known of the defect.¹ Notice of such defects

⁴See *Emerson v. Lowell Gas Co.*, 3 Allen, 410; *Holly v. Boston Gas Co.*, 8 Gray, 123.

⁵*Brown v. N. Y. Gas Co.*, Anth. N. P. 351. But it is not negligence not to anticipate an unreasonable and extraordinary use of the streets, and not to strengthen the pipes accordingly (Ib). In *Koelsch v. Philadelphia Co.* (152 Pa. St. 355; 25 Atl. 522), defendant accounted for the separation of the joints of the main by the recent construction of a sewer in close proximity. Held, that if such injury was the natural consequence of the construction of the sewer, and defendant knew, or ought to have known, of its construction, it was its duty to guard against any damage likely to ensue, and it was for the jury to determine whether defendant ought to have known thereof within a shorter time than elapsed between the commencement of work on the sewer and the discovery of the leak.

⁶Defendant laid a three-inch pipe through which it transported natural gas at the dangerous pressure of 300 pounds to the square inch, the pipe being poorly pointed and permitting gas to escape and explode.

Held, negligence sufficiently shown (*Lebanon Light, etc. Co. v. Leap*, 139 Ind. 443; 39 N. E. 57). Under an Ohio statute (Rev. Stat., § 3561a), parties transporting natural gas in pipes are absolutely liable for damages from explosions, etc., irrespective of negligence (*Gas Fuel Co. v. Andrews*, 50 Ohio St. 695; 35 N. E. 1059).

⁷*Washington Gas Co. v. Dist. of Columbia*, 161 U. S. 316; 16 S. Ct. 564 [box in sidewalk for access to cock in service pipe]; and cases cited under § 359, *ante*.

¹Testimony that two or more holes were found in defendant's main, one having "the appearance of being rusted, worn out," added to the escape of the gas, will justify a finding either that the pipe was defective when put down, or that it had been in use too long, and that defendant ought to have known its unsafe condition (*Koelsch v. Philadelphia Co.*, 152 Pa. St. 355; 25 Atl. 522). *s. p.*, *Lee v. Vacuum Oil Co.*, 54 Hun, 156; 7 N. Y. Supp. 426; *Emerson v. Lowell Gas Co.*, 3 Allen, 410; *Holly v. Boston Gas Co.*, 8 Gray, 123; *Butcher v. Providence Gas Co.*, 12 R. I. 149; *Chisholm v. Atlantic Gas Co.*, 57 Ga.

will always be implied on proof that the company had not adopted and maintained a regular system of inspection for the prompt detection and remedy of defects in its apparatus, caused by natural decay, action of frost or otherwise;² and although such a system had been adopted, and an inspection made in a particular case, the company is nevertheless liable for failure to discover a defect if it was one which men of ordinary skill in the business would have discovered on a careful inspection.³ If it was not a defect thus discoverable, the

28; *Pine Bluff Light Co. v. Schneider*, 62 Ark. 109; 34 S. W. 547; *Consumers' Gas Co. v. Perrego*, 144 Ind. 350; 43 N. E. 306. It is no defense that a gas tank was constructed so as to be perfectly tight when built, and not liable to break under any natural action of the weather or the soil (*Hipkins v. Birmingham Gas Co.*, 6 Hurlst. & N. 250).

² "Its pipes should not only be of such material and workmanship and laid in the ground with such skill and care as to provide against the escape of gas therefrom when new, but such system of inspection should be maintained as will insure reasonable promptness in the detection of all leaks from deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in business" (*Koelsch v. Philadelphia Co.*, *supra*). "All that a gas company can reasonably be required to do is to afford ample facilities to all parties interested to make communications to them, to institute and maintain an efficient system of oversight and superintendence, and to be prepared with a sufficient force, ready to be put in action, and fully competent to supply and furnish a prompt remedy for all such accidents, defects and interruptions in the conduct of their affairs, as from experience and the character and peculiarity of their works there was

any reasonable ground to anticipate might occur. To know, therefore, whether due diligence has been exerted in any particular instance, it is necessary to know what is their general system, and what are the means of relief at their command and within their control" (*Holly v. Boston Gas Co.*, 8 Gray, 123) S. P. *Powers v. Boston Gas Co.*, 158 Mass. 257; 33 N. E. 523; *Kiebele v. Philadelphia*, 105 Pa. St. 41; *Evans v. Keystone Gas Co.*, 148 N. Y. 112; 42 N. E. 513; *aff'g* 72 Hun, 503; 25 N. Y. Supp. 191. In the last case, held, that proof that trees and grass in the neighborhood of a gas main decayed and died from the time it was laid until it was recalked and that from that time there was a healthy growth was sufficient to justify a finding that the damage to the trees was due to a leakage of gas. And see *Armbruster v. Auburn Gas Co.*, 18 N. Y. App. Div. 447; 46 N. Y. Supp. 158 [gas percolated through ground into plaintiff's greenhouse and injured plants].

³ Cases *supra*. The fact that an explosion takes place from a fracture or defect, which has existed for several days, during which time it has also been discoverable (by reason of the smell of the escaping gas), and would have been discovered by proper inspection, is evidence of negligence on the part of the company; and it is not enough to relieve

company will not be liable for the damage caused after the time when the plaintiff, having knowledge of an escape of gas in his house and acting with due diligence, might have notified the company of the fact.⁴ It is the company's duty to keep a sufficient force on hand to meet promptly all probable occasion for repairs; although it is not required to anticipate any extraordinary demand upon its resources; and it is not in fault if, by reason of circumstances which could not reasonably have been foreseen by a prudent man, its repairing force is not sufficient to meet at once all the demands that are made upon it.⁵ The bare fact, however, that gas escaped from defendant's pipe is *prima facie* evidence of some neglect on its part, from which a jury is at liberty to draw the inference of want of due care in conducting the gas.⁶ A jury may hold it to be negligence, for a gas company to omit to inspect the several apartments of a building, into some of which gas is about to be introduced, to ascertain if any of the pipes in the apartments not to be supplied are properly capped to prevent an escape of

it from liability that, upon notice of the escape, it sent a workman to repair the defect, he arriving too late to do so (*Mose v. Hastings, etc. Gas Co.*, 4 Fost. & F. 324; *s. p.*, *McGahan v. Indianapolis Gas Co.*, 140 Ind. 335; 37 N. E. 601 [the delay in complying with request to shut off gas must be proximate cause of explosion]. The difficulty of digging in frozen ground and the greater length of time required to reach a main, are to be considered on the question of reasonable diligence in finding and stopping a leak (*Emerson v. Lowell Gas Co.*, 3 Allen, 410). Whether reasonable diligence was used to discover the source of the leak, and to remedy it within a reasonable time, is for the jury (*Consol. Gas Co. v. Crocker*, 82 Md. 113; 33 Atl. 423).

⁴ *Hunt v. Lowell Gas Co.*, 1 Allen, 343; *s. c.* again, 3 Id. 418 (see note 2, § 81, *ante*).

⁵ *Holly v. Boston Gas Co.*, 8 Gray,

123. A jury will not be warranted in inferring negligence from an explosion of gas, due to the breaking of defendant's mains and pipes by the fall of buildings in a great fire, it not appearing to have been practically possible, under the circumstances, to reach the valves to shut off the gas (*Hutchinson v. Boston Gas Co.*, 122 Mass. 219).

⁶ *Carmody v. Boston Gas Co.*, 162 Mass. 539; 39 N. E. 184; *Smith v. Boston Gas Co.*, 129 Mass. 318. See *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355; 25 Atl. 522; *Ottersbach v. Philadelphia*, 161 Pa. St. 111; 28 Atl. 991 [neglect to locate leak and replace broken pipe, after actual notice]; *Anderson v. Standard Gas Co.*, 17 N. Y. Misc. 625; 40 N. Y. Supp. 671 [leak in meter]; *Hipkins v. Birmingham Gas Co.*, 6 Hurlst. & N. 250; *Citizens' Gas Co. v. O'Brien*, 118 Ill. 174.

gas, before it turns it into the building.⁷ It is nowhere held that the company's liability for negligence in the inspection and repair of its pipes and other appliances is limited to those between whom and itself some contractual relation exists.⁸

§ 694. [consolidated with § 693.]

§ 695. **Contributory act of stranger.**—If the apparatus furnished by a gas company is unfit for use when furnished, the company will be liable for an injury arising partly from that cause, and partly from the negligence of a stranger.¹ Thus, where gas escaped into the plaintiff's house from a defective pipe, and a gas-fitter took a lighted candle near the pipe to find where the leak was, the company was held liable for the explosion which ensued.² But the company will not be liable for the consequences of mismanagement by a stranger, if the apparatus is sound,³ or the company had no control over it.

§ 696. **Defense of contributory negligence.**—It is no defense, where an injury is proved to have been caused by the escape of gas or washings through the negligence of the company, to show that the injury was aggravated by other causes. Hence, where the gas escapes into a neighbor's well, the company is not exonerated by the fact that other causes added to the impurity of the water.¹ It is not contributory negligence, as matter of law, to enter a cellar where gas is perceptibly

¹ *Schmeer v. Syracuse Gas Co.*, 147 N. Y. 529; 42 N. E. 202; revg. 73 Hun, 616; 26 N. Y. Supp. 1128. See s. c. on a former appeal, 65 Hun, 378; 20 N. Y. Supp. 168.

² See *Schmeer v. Syracuse Gas Co.*, *supra*; *Finnegan v. Fall River Gas Co.*, 159 Mass. 311; 34 N. E. 523; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 N. E. 1113.

¹ Cases cited under § 34, *ante*.

² *Burrows v. March Gas Co.*, L. R. 5 Exch. 67; 7 Id. 96. See *Parry v. Smith*, L. R. 4 C. P. Div. 325; *Pine Bluff Light Co. v. McCain*, 62 Ark. 118; 34 S. W. 549.

³ *Flint v. Gloucester Gas Co.*, 9 Al-

len, 552. The text sustained: *Schermerhorn v. Metropolitan Gas Co.*, 5 Daly, 144. Negligence of lessee held to be that of landlord (*Bartlett v. Boston Gas Co.*, 117 Mass. 533).

¹ *Sherman v. Fall River Iron Co.*, 5 Allen, 213; *Blenkiron v. Gr. Central Gas Co.*, 2 Fost. & F. 437; and cases cited under §§ 93, 94, 95, *ante*. So, if gas escapes upon the land of a person who himself negligently creates a noxious gas, he may nevertheless recover for damage done by the gas entering upon his land, if its evil effects were not due to the mingling of the two gases (*Brown v. Illius*, 27 Conn. 84).

escaping,² or to search for the location of the leak with a light.³ To do so may or may not be dangerous, according to the circumstances, among others, the extent of the leak, the size of the inclosure where located, and the length of time the leak has existed: the question, therefore, is for the jury.⁴

§ 697. Negligence of company's servants. — The company is responsible for the negligence of its servants, not only in respect to its own works, but also in respect to all the details of its business. It is, therefore, liable for damage occasioned by such negligence in any work done by its servants with a view to its benefit, even though such work consists of repairs to property not belonging to the company. Thus, if the company's gas is escaping from a leak in a connecting pipe which does not belong to it, it is responsible for the negligence of its servants in attempting to stop the leak.¹ But any subsequent injury, *e. g.*, from an explosion, must be shown to have been proximately caused by the servant's negligent act or omission.²

²*Finnegan v. Fall River Gas Co.*, 159 Mass. 311; 34 N. E. 523 [city employee, under duty to read water meter, entered cellar: death by inhaling gas].

³*Schmeer v. Syracuse Gas Co.*, 147 N. Y. 529; 42 N. E. 202; *Consol. Gas Co. v. Crocker*, 82 Md. 113; 33 Atl. 423 [explosion ten minutes after entry with light]; *Pine Bluff Light Co. v. Schneider*, 62 Ark. 109; 34 S. W. 547.

⁴*Schmeer v. Syracuse Gas Co.*, *supra*. See *Lanigan v. N. Y. Gas Co.*, 71 N. Y. 29 [plaintiff in fault]; *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1 [same]. It is for the jury to say whether plaintiff was negligent in leaving the end of a house pipe open and connected with the service pipe, after being told by defendant's servant that a valve between it and the main which the latter had opened, would be kept closed (*Baker v. Westmoreland Gas Co.*, 157 Pa. St. 593; 27 Atl. 789).

¹*Lannen v. Albany Gas Co.*, 46 Barb. 284; *affi'd*, 44 N. Y. 459. In that case, defendant sent a servant to examine into the cause of a leak in plaintiff's cellar. The servant entered the cellar with a light, and an explosion followed which injured plaintiff. It seemed probable that the leak was in a pipe belonging to the owner of the house, and defendant asked the court to charge that, if this was the fact, defendant was not liable for the negligence of its servant in attempting to repair the pipe. The court refused to do so; and its ruling was sustained, partly on the ground that the servant caused the damage while merely seeking to ascertain the *locality* of the leak and partly on the ground stated in our text. The leak was below the meter; and the loss of the gas, therefore, fell entirely on the defendant.

²*Schaum v. Equitable Gas Co.*, 15 N. Y. App. Div. 74; 44 N. Y. Supp.

§ 698. **Electrical works.** — The business of supplying the public with electricity, like that of supplying gas, for lighting or other purposes, involves the handling of a highly dangerous agent, and therefore requires a corresponding degree of care on the part of one who undertakes it, to prevent injury to persons lawfully¹ in any place where his wires are strung, whether over a highway² or on a house top.³ He is bound, for example, to place them high enough to enable persons rightfully there to pass under, without coming in contact with, them,⁴ and to keep them properly insulated, so that one inadvertently coming in contact with a wire shall not be injured by a discharge of electricity.⁵ The fact that other conditions must

284; *Krzywoszynski v. Consol. Gas Co.*, 4 N. Y. App. Div. 161; 38 N. Y. Supp. 929 (see s. c., 11 N. Y. Misc. 61; 31 N. Y. Supp. 857). See *Taylor v. Baldwin*, 78 Cal. 517; 21 Pac. 124 [stoppage of pipe not proximate cause of explosion].

¹In *Sullivan v. Boston & Albany R. Co.* (156 Mass. 378; 31 N. E. 128), a boy in search of a ball which had lodged on a roof, went there, without owner's consent, and came in contact with defendant's live electric wire and was killed. Held, that being a mere licensee at most, defendant owed him no duty with respect to the wire, except to refrain from setting a trap for him or from doing him intentional or wanton harm.

²*Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224; 30 Atl. 553; *Arkansas Tel. Co. v. Ratteree*, 57 Ark. 429; 21 S. W. 1059; and cases cited under § 359, *ante*.

³*Ennis v. Gray*, 87 Hun, 355; 34 N. Y. Supp. 379. In that case, plaintiff, a roofer, was engaged on the cornice of a house along which electric wires were placed, with which he inadvertently came in contact, and received a charge of electricity. Defence that the electric company owed him no duty over-

ruled, and held that proof that the primary wires of a converter, used to change a high tension current to a low tension, were improperly placed and improperly insulated, and exposed to contact by any one going near it, was sufficient to prove negligence.

⁴*Giraudi v. Electric Imp. Co.*, 107 Cal. 120; 40 Pac. 108. In that case, defendant's wires stretched sixty feet across a roof at an average height of two feet therefrom. Plaintiff went to the roof to secure a sign at night, not knowing, or forgetting, the presence of the wires, came into contact with them and received a shock. Held, that hanging the wires so low was negligence, and the shock received by plaintiff was proof that they were not covered, — "a very high degree of care" being required. In *McMullan v. Edison Electric Co.* (13 N. Y. Misc. 392; 34 N. Y. Supp. 248), the wires entered the house in the cellar eight feet from the ground, and the current did not exceed 230 volts, which could not cause death or great bodily harm. Held, that defendant was not liable to one at work there.

⁵*Giraudi v. Electric Imp. Co.*, *supra*. In *Myhan v. Louisiana Electric, etc. Co.* (41 La. Ann. 964; 6 So.

occur to render contact with electric wires dangerous cannot excuse their owner from taking reasonable care, in view of all the circumstances likely to occur, to have the wires properly insulated.⁶ And it cannot be said to be contributory negligence, as matter of law, for one to inadvertently touch an electric wire, unless the worn condition of its covering was so apparent that he either saw it or should have seen it, especially if he was ignorant of the danger of coming in contact with non-insulated wires.⁷ One who lets the use of a structure, *e. g.*, a telegraph pole, for attaching electric wires thereto, is liable for defects in the structure by which electricity is caused to escape from the lessee's wires, injuring a third person.⁸

799). defendant's employee was instantly killed, while in the discharge of his duties, by coming in contact with one or more wires on or near the floor of defendant's building. Defendant having been notified several times of the dangerous arrangement of the wires on the floor, and that the better way would be to run them on the ceiling, was held liable for the death.

⁶ *Illingsworth v. Boston El. Light Co.*, 161 Mass. 583; 37 N. E. 778. One injured by an electric wire cannot be presumed, in the absence of evidence, to have had knowledge that moisture destroyed the insulation of such a wire (*Giraudi v. Electric Imp. Co.*, *supra*).

⁷ *Griffin v. United El. Light Co.*, 164 Mass. 492; 41 N. E. 675 [tinsmith at work on ladder near roof; wire attached to side of building; iron pipe in his hands came in contact with it]. See *Harroun v. Brush El. Light Co.* (13 N. Y. App. Div. 126; 42 N. Y. Supp. 716), as to employee's contributory negligence in not wearing rubber gloves, while working around wires.

⁸ *Western U. Tel. Co. v. Thorn*, 12 C. C. A. 104; 64 Fed. 287. In that case, defendant's broken telegraph wire, which hung to the

ground, came in contact with a third party's electric wire on the same pole, and a shock was communicated to plaintiff from latter wire through defendant's wire. This is on the same principle which subjects a telegraph company to liability for negligently leaving a broken wire, along which lighting passes so as to set fire to a building (*Jackson v. Wisconsin Tel. Co.*, 88 Wisc. 243; 60 N. W. 430). See, also, *Hector v. Boston El. Light Co.*, 161 Mass. 558; 37 N. E. 773; *Ahern v. Oregon Tel. Co.*, 24 Oreg. 276; 33 Pac. 403; s. c., 35 Id. 549. The duty of a company which grants to another company the use of its poles is to exercise reasonable care that its wires are kept, so far as practicable, in a safe condition at such places as the servants of the latter company are expressly or impliedly licensed to go in performing their duties with reference to the wires attached to the former's poles (*Illingsworth v. Boston El. Light Co.*, 161 Mass. 583; 37 N. E. 778). In that case, defendant left two joints of its wires without insulation within twelve to fifteen inches of the frame on which a servant of licensee in the course of his duty was required or expected to go.

CHAPTER XXXVI.

LAND AND STRUCTURES.

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| <p>§ 699. Obligation of owner of land.</p> <p>700. Liberty in use of premises.</p> <p>701. Interference with lateral support.</p> <p>701<i>a</i>. Owner's absolute liability.</p> <p>702. Dangerous structures.</p> <p>702<i>a</i>. Violation of building laws : fire escapes.</p> <p>703. Liability to travelers on adjoining highway.</p> <p>704. Liability to business visitors.</p> <p>705. Liability to person entering under bare license.</p> <p>706. Owner's liability to his invited guest.</p> <p>707. Unusual or improper use of land or buildings.</p> <p>708. Landlord's liability for defects arising after lease.</p> <p>709. Liability to tenant for defects at date of lease.</p> <p>709<i>a</i>. Liability to strangers for defects at date of lease.</p> <p>710. Liability of partial lessor.</p> | <p>§ 711. [Consolidated with § 709.]</p> <p>712. Tenant, when not liable.</p> <p>713. Tenant, when liable.</p> <p>714. [Consolidated with § 343.]</p> <p>715. [Consolidated with § 703.]</p> <p>716. Miner's absolute liability.</p> <p>717. Miner's liability for negligence.</p> <p>718. Liability for condition of unfinished buildings.</p> <p>719. Trap-doors, hoistways, hatchways, etc.</p> <p>719<i>a</i>. Passenger elevators.</p> <p>720. Traps for trespassers.</p> <p>721. Dripping water and snow.</p> <p>722. [Consolidated with § 709.]</p> <p>723. Occupant's liability for leakage.</p> <p>724. Liability where landlord and tenant are both in fault.</p> <p>725. Wharfingers, etc.</p> <p>726. Inspection of wharves.</p> <p>727. [Omitted.]</p> |
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§ 699. **Obligation of owner of land.** — Although it was once held otherwise,¹ it has now been long well settled that the ownership of land does not involve any liability for injuries arising from its use, nature or condition, which is not founded upon the same principles and subject to the same limitations, as the liability which attaches to the ownership of chattels.² The

¹ *Bush v. Steinman*, 1 Bos. & P. 404; *Sly v. Edgley*, 6 Esp. 6; *Laughter v. Pointer*, 5 Barn. & Cr. 547; *Lowell v. Boston & Lowell R. Co.*, 23 Pick. 24; *Stone v. Cheshire R. Co.*, 19 N. H. 427; *Wiswall v. Brinson*, 10 Ired. Law, 554; *New York v. Bailey*, 2 Denio, 433, per *Walworth, Ch.*

² *Overton v. Freeman*, 11 C. B. 867; *Reedie v. Northwestern R. Co.*, 4 Exch. 244; *Blake v. Ferris*, 5 N. Y. 48; *Hilliard v. Richardson*, 3 Gray, 349; *Cuff v. Newark, etc. R. Co.*, 35 N. J. Law, 17; *Painter v. Pittsburg*, 46 Pa. St. 213; *Prairie, etc. Co. v. Doig*, 70 Ill. 52; *Cunningham v. International R. Co.*, 51 Tex. 503.

“owner,” within the meaning of this chapter, is the person who holds the legal title either in his own right or in trust for another,³ with the right to the possession and management of the premises and authority to keep them in repair;⁴ and therefore, if the sole equitable and beneficial interest, coupled with the control of the land, is in another, the latter, and not the trustee is the person answerable for the condition of the land.⁵ So an owner who has surrendered possession to another, under a contract of purchase and sale, is not liable for the possessor’s wrongful use of the land to the injury of another, although he retains the title.⁶ And so one who assumes to be the owner, and, as such, to control and manage the property, and to contract for its use, cannot escape liability to a tenant for its defective condition, by showing want of title in himself.⁷ Infants and lunatics are not exempt from the responsibilities of ownership of land; and where notice of its defective condition is necessary, notice to their guardians, is notice to them.⁸

§ 700. **Liberty in use of premises.** — Every man may use his own land for all lawful purposes to which such lands are usually applied, without being answerable for the consequences,

³ Trustees who are in occupation, and receive the benefits of the property, are liable for injuries from non-repair (*Murray v. Archer*, 52 Hun, 613; 5 N. Y. Supp. 326). They may be *personally* liable (*Keating v. Stevenson*, 21 N. Y. App. Div. 604; 47 N. Y. Supp. 847).

⁴ In *Butler v. Townsend* (84 Hun, 100; 31 N. Y. Supp. 1094), use of land was devised to widow who was in sole possession and control, the executors having no authority under will to spend estate for repairs. Held, latter not liable for defective condition of premises.

⁵ *Denver v. Solomon*, 2 Colo. App. 534; 31 Pac. 507.

⁶ *Earle v. Hall*, 2 Metc. 353 [in preparing to build house, purchaser undermined the adjoining house]. In that case, Shaw, C. J., said: “The owner of real estate, either absolute-

ly or for the time being; he who has the management and control, and takes the benefit and profit of the estate; he at whose expense and on whose account the business is conducted, is responsible to third persons for the carelessness, negligence or want of skill of those who are carrying on and conducting the business, by which they are damnified.”

⁷ *Lindsey v. Leighton*, 150 Mass. 285; 22 N. E. 901. In *Burt v. Wrigley* (43 Ill. App. 367), father conveyed land to his daughter and built a house thereon. Held, he was liable for negligence of his employee in leaving hole in sidewalk.

⁸ *Morain v. Devlin*, 132 Mass. 87 [lunatic]; *McCabe v. O'Connor*, 4 N. Y. App. Div. 354; 38 N. Y. Supp. 572; and cases cited under § 121, *ante*.

provided he exercises ordinary care and skill to prevent any unnecessary injury to the adjacent land-owner,¹ subject, however, to the right of lateral support which all land has, in its natural state, and such further limitations as are imposed by the law of real property. It is not, therefore, necessarily negligence on the part of a land-owner to make a use of his land which inevitably produces loss to his neighbor; for as he may wilfully adopt such a course, and yet not be a wrong-doer,² much less is he liable for unintentionally doing that which he has a right to do intentionally.

§ 701. Interference with lateral support.—The right of lateral support of land from the adjoining soil is an absolute right of property, and any interference therewith is actionable, whether due care and skill were or were not exercised in the act of interference.¹ But as this right is incident only to the

¹ Radcliff v. Brooklyn, 4 N. Y. 195; Phelps v. Nowlen, 75 Id. 39 [malicious motives of owner not to be considered]; Chatfield v. Wilson, 28 Vt. 49; Howard v. Benton, 32 Id. 737; Pomroy v. Granger, 18 R. I. 624; 29 Atl. 690; Leavenworth Lodge v. Byers, 54 Kans. 323; 38 Pac. 261; Hummel v. Seventh St. Terrace Co., 20 Oreg. 401; 26 Pac. 277; and cases cited under next section. One who makes an excavation upon his lot in such a manner as to cause a pitfall upon an adjoining lot is liable for the death of child of adjoining owner falling into the pit (Mayhew v. Burns, 103 Ind. 328; 2 N. E. 793).

² Phelps v. Nowlen, 72 N. Y. 39. See, as to drainage of surface water, § 735, *post*.

¹ Schultz v. Bower, 57 Minn. 493; 59 N. E. 631 [railroad cut; failure to build retaining wall]. In Victor Min. Co. v. Morning Star Min. Co. (50 Mo. App. 525), a mine owner who omitted to leave the pillars and other supports necessary to insure the absolute safety of the superincumbent surface, on which he had

heavy structures and operated machinery, was held not entitled to lateral support from an adjoining mine, and could not enjoin the owner thereof from mining, with ordinary care, up to the dividing line, where the character of the soil was such that it would sustain its own weight and the natural pressure thereon, by the power of its own coherence, without the aid of the support of the surrounding soil. See, also, Sullivan v. Zeiner, 98 Cal. 346; 33 Pac. 209; Briggs v. Klosse, 5 Ind. App. 129; 31 N. E. 208; McGettigan v. Potts, 149 Pa. St. 155; 24 Atl. 198. The right of lateral support of land in its natural state is an incident to ownership, and does not depend on the question whether the withdrawal was negligently or wrongfully done (Ulrick v. Dakota Trust Co., 2 S. Dak. 285; 49 N. W. 1054; *aff'd* 51 Id. 1023). *s. p.*, Farrand v. Marshal, 21 Barb. 409; *s. c.*, 19 Id. 380; Gilmore v. Driscoll, 122 Mass. 199; Pomroy v. Granger, 18 R. I. 624; 29 Atl. 690; Folev v. Wyeth, 2 Allen. 131; Brown v. Robins, 4 Hurlst. & N. 186;

land itself, in its natural condition, when not subject to artificial pressure, the damages recoverable for simple withdrawal of lateral support will not include injuries to structures upon, or artificial arrangements of, the land,² in the absence of a contract obligation or some special circumstances;³ provided the withdrawal is not done negligently; but if so done, the damages to the land as well as those to the superstructures are recoverable.⁴ In withdrawing this support, the adjoining land-

Smart v. Morton, 5 El. & B. 30). See cases cited under next section.

² Northern Transp. Co. v. Chicago, 99 U. S. 635; Thurston v. Hancock, 12 Mass. 221; Gilmore v. Driscoll, 122 Id. 199; Beard v. Murphy, 37 Vt. 99; Panton v. Holland, 17 Johns. 92; Farrand v. Marshall, 19 Barb. 350; McGuire v. Grant, 25 N. J. Law, 356; Richart v. Scott, 7 Watts. 460; McGettigan v. Potts, 149 Pa. St. 155; 24 Atl. 198; Stimmel v. Brown, 7 Houst. 219; 30 Atl. 996; Moellering v. Evans, 121 Ind. 195; 22 N. E. 989; Quincy v. Jones, 76 Ill. 231; Eads v. Gains, 58 Mo. App. 586; Rowland v. Murphey, 66 Tex. 534; 1 S. W. 658. This distinction seems to have been lost sight of in Baltimore, etc. R. Co. v. Reaney (42 Md. 117), where a railroad company was held liable for the settling and cracking of house-walls on a street under which it was tunneling, no negligence being shown.

³ Ancient buildings, and those which were granted by the owner of the lot on which the excavation is made, or by those from whom he derives title, appear to be entitled to the lateral support of the adjoining land (*Lasala v. Holbrook*, 4 Paige, 169; and see *Elliot v. Northeastern R. Co.*, 10 H. L. Cas. 333; *Rogers v. Taylor*, 2 Hurlst. & N. 828). In England, the rule is that no structure less than twenty years old is entitled to such support (*Wyatt v. Harrison*, 3 B. & Ad. 872; *Patridge v. Scott*, 3 Mees. & W. 220; and see *Allaway v.*

Wagstaff, 4 Hurlst. & N. 681). A structure of that age is so entitled (*Hide v. Thornborough*, 2 Carr. & K. 250). Compare a peculiar case to the contrary: *Angus v. Dalton*, L. R. 3 Q. B. Div. 85; and see *Thurston v. Hancock*, 12 Mass. 220; *Runnels v. Bullen*, 2 N. H. 532. So a person who has the right to take down his neighbor's wall and replace it by a stronger, will be liable for want of care in so doing (*Gettsworth v. Hedden*, 30 La. Ann. 30). *s. p.*, *Lancaster v. Connecticut Mut. Life Ins. Co.*, 92 Mo. 460; 5 S. W. 23 [inserting girder in party wall]. In *Stevenson v. Wallace* (27 Gratt. 77), there was a prescription or implied grant to support both the land and the building of plaintiff. Held, erroneous to instruct jury that it was plaintiff's duty to protect her building by providing supports, and that the defendant was not liable if plaintiff had knowledge of the danger and could have averted it by prompt action.

⁴ *Foley v. Wyeth*, 2 Allen, 131; *Dorrity v. Rapp*, 72 N. Y. 307; *Quincy v. Jones*, 76 Ill. 231; *Charliss v. Rankin*, 22 Mo. 566; *Watson Lodge v. Drake* [Ky.], 29 S. W. 632. A charge that if defendant removed the lateral support to plaintiff's land he would be liable for damage resulting to the buildings thereon is erroneous, where it fails to state that a different rule is to be applied in case the soil is removed care-

owner is, therefore bound to use such care and caution that (as nearly by reasonable exertion it is possible to secure such a result) his neighbor shall suffer no more injury than would have accrued if the structure had been put where it is, without ever having had the support of his land.⁵ One who digs away land which affords support to an adjoining house ought to give the owner reasonable notice of his intention to do so;⁶ and he must allow the latter all reasonable facilities for obtaining artificial support, including a temporary privilege of shoring up the house by supports based upon the former owner's land.⁷

lessly from that applicable when it is removed carefully (*Moelling v. Evans*, 121 Ind. 195; 22 N. E. 989). *s. p.*, *Ulrick v. Dakota Loan, etc. Co.*, 3 S. Dak. 44; 51 N. W. 1023; *Hummel v. Seventh St. Terrace Co.*, 20 Oreg. 401; 26 Pac. 277. Negligence is not to be presumed from the fact of the withdrawal of lateral support and consequent injury (*Ward v. Andrews*, 3 Mo. App. 275). The employment of a competent architect and skillful workman negatives the charge of negligence (*United States v. Peachy*, 36 Fed. 160), provided their advice was followed; otherwise, if it was disregarded (*Hammond v. Schiff*, 100 N. C. 161; 6 S. E. 753). See *Moody v. McClelland*, 39 Ala. 45; *Campbell v. Lunsford*, 83 Id. 512; 3 So. 522 [owner liable, though work done under direction of supervising architect].

⁵ This seems to be the proper test, though not clearly set forth in the cases. In *Trower v. Chadwick* (3 Bing. N. C. 384; *s. c.*, 3 Scott, 669), it was held to be a good ground of action that the defendant conducted himself so negligently and unskillfully in pulling down his own wall, as by reason thereof to injure his neighbor's. So an action lies against one who, by negligence in excavating his own ground, either causes

or accelerates the fall of an adjoining house (*Dodd v. Holme*, 1 Ad. & El. 493; see *Haines v. Roberts*, 7 El. & Bl. 625). A. dug a well near B.'s land, which sank in consequence, and a building erected on it within twenty years fell. It was proved that if the building had not existed, the land would still have sunk, but the damage would have been inappreciable. Held, that B. had no cause of action against A. (*Smith v. Thackerah*, L. R. 1 C. P. 564). But where plaintiff's land would have fallen, and caused him real damage, even had there been no house on it, he may recover for the damage done to the house as well as to the land (*Brown v. Robins*, 4 Hurlst. & N. 186).

⁶ *Dorrity v. Rapp*, 72 N. Y. 307; *Schultz v. Byers*, 53 N. J. Law, 442; 22 Atl. 514; *Aston v. Nolan*, 63 Cal. 269. The fact that notice was given as required by law, will not relieve owner of his duty to do the work in a careful and prudent manner (*Ulrick v. Dakota Loan, etc. Co.*, 2 S. Dak. 285; 49 N. W. 1054).

⁷ Where the right to take down a party-wall because unsafe exists, the party taking it down without the consent of the other must provide the support which the latter needs for his building (*Maypole v. Forsyth*, 44 Ill. App. 494).

The precautionary measures to be taken to avoid injury in such cases are very generally prescribed by statute or ordinance; and a violation of the duty thus prescribed is of itself sufficient to justify a recovery for a resulting injury, which would not have occurred but for such violation.⁸

§ 701a. Owner's absolute liability. — A land-owner is absolutely responsible for any act of his own, or of his servants under his actual or ostensible authority, which results in casting any part of his property upon the land of another, although he may have used all possible care to avoid such a consequence: inasmuch as the mere entry of his property upon that of another, by his act, is a trespass.¹ So he is liable for the consequences of creating or maintaining a nuisance on his land, as by keeping dangerous things thereon, or prosecuting a business which will necessarily or probably cause injury to his neighbors; and this, notwithstanding he may have used all possible care in the keeping of such things, or in the prosecuting of such business.² Many applications of this rule

⁸ Under the California statute (Civ. Code, § 832), both owner and contractor are liable for the latter's failure to take the statutory precautions (*Green v. Berge*, 105 Cal. 52; 38 Pac. 539). See *Hart v. Ryan* (53 Hun, 638; 6 N. Y. Supp. 921), where contractor was held liable for negligence of sub-contractor working under his supervision.

¹ *Tremain v. Cohoes Co.*, 2 N. Y. 763; *St. Peter v. Denison*, 58 Id. 415; *Jutte v. Hughes*, 67 Id. 267; *Mairs v. Manhattan Asso.*, 89 Id. 498; *Baltimore Breweries Co. v. Ranstead*, 78 Md. 501; 28 Atl. 273. Defendant held liable where his wire rope fence became decayed and pieces fell upon plaintiff's land and were swallowed by his cattle (*Firth v. Bowling Iron Co.*, L. R. 3 C. P. Div. 254). In *Brown v. McAllister*, (39 Cal. 573), the owner of property was held *not* responsible for things over which he had no control, as, for example, for injuries produced by

loose earth, coming from other land, and rolling over his land upon the land of a third person below. A person engaged in improving his own land must use every practical means to avoid injury to his neighbor, and he will not be permitted by the use of powerful explosives to injure his neighbor's house (*Hill v. Schneider*, 13 N. Y. App. Div. 299; 43 N. Y. Supp. 1). See other blasting cases, cited under § 688a, *ante*. The accidental falling on adjoining property of bricks and mortar from a structure in course of erection is not a trespass (*Pye v. Faxton*, 156 Mass. 471; 31 N. E. 640; *Smith v. Milwaukee Builders' Exch.*, 91 Wisc. 360; 64 N. W. 1041). As to washings and refuse from gas works, see § 692, *ante*.

² *Bamford v. Turnley*, 3 Best & S. 66; *Tipping v. St. Helen Smelting Co.*, 4 Id. 608; 11 H. L. Cas. 642. See *Wilson v. New Bedford*, 108 Mass. 261 [water-reservoir]; *Cahill v. Eastman*, 18

of liability under the law of nuisances might be cited, but are passed as not involving liability for negligence.⁵ The extreme doctrine of *Rylands v. Fletcher*,⁶ to the effect that a land-owner is responsible absolutely for the damage caused by the accidental and unexpected escape from his land of anything which he brings or accumulates thereon, and which in its nature is dangerous, if it does escape, is not accepted in this country.⁷ But if the thing is one which, by its nature, is certain to escape to adjoining land,⁸ the owner is liable for the consequences, without regard to any question of negligence.

Minn. 324; *Frost v. Berkeley Phosph. Co.*, 42 S. C. 402; 20 S. E. 280 [phosphate works]; *Baltimore, etc. R. Co. v. Fifth Baptist Ch.*, 108 U. S. 317 [engine house and machine shop]; *Heeg v. Licht*, 80 N. Y. 579 [powder magazine]; *Lafin, etc. Powder Co. v. Tearney*, 131 Ill. 322; 23 N. E. 389 [same]; *Tiffin v. McCormack*, 34 Ohio St. 638 [stone-quarry; blasting]; *Dunsbach v. Hollister*, 49 Hun, 352 [uncovered sand-pile]; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268; 20 Atl. 900 [fertilizer factory]; *Euler v. Sullivan*, 75 Md. 616; 23 Atl. 845 [smoke, steam and cinders from factory chimney]; *Re Penn. Lead Co.*, 96 Pa. St. 116 [lead smelting]. A lot-owner has no right to erect a building, of so unusual construction, so near the street, that snow or ice will fall from it, in the ordinary course of things, so as to endanger travelers in passing, and, if he does so, will be liable without further proof of negligence (*Shepard v. Creamer*, 160 Mass. 496; 36 N. E. 475; *Smethurst v. Barton Square Ch.*, 148 Mass. 261; 19 N. E. 387). See *Grandona v. Lovdal*, 70 Cal. 161; 11 11 Pac. 623 [roots of trees projecting into adjacent land].

⁵ Thus one who piles sand on his lot against the wall of his neighbor's building, the pressure of which injuries the wall, is liable for an

injury to the wall (*Davis v. Evans*, 59 Hun, 618; 13 N. Y. Supp. 437). One is not relieved from liability for maintaining a nuisance by the fact that he was authorized by statute to buy and hold land for the manufacturing of the particular article which created the injury. It is only where the particular location of the business is sanctioned by statute that the rule of requiring proof of negligence applies (*Bohan v. Port Jervis Gas Co.*, 45 Hun, 257 [noxious odors from gas works; injunction]). See also *Mairs v. Manhattan Asso.*, 89 N. Y. 498; and other cases in note 2.

⁶ L. R. 3 H. L. 330; s. c. below, L. R. 1 Ex. 265.

⁷ § 728, *post*; *Losee v. Buchanan*, 51 N. Y. 476; *Brown v. Collins*, 53 N. H. 442; *Marshall v. Welwood*, 38 N. J. Law, 339; *Berger v. Minneapolis Gas Co.*, 60 Minn. 296; 62 N. W. 336 [modifying *Cahill v. Eastman*, 18 Minn. 324; *Hannem v. Pence*, 40 Minn. 127; 41 N. W. 657]; *Defiance Water Co. v. Olinger*, 54 Ohio St. 532; 44 N. E. 238; *Everett v. Hydraulic Co.*, 23 Cal. 225; *Todd v. Cochell*, 17 Id. 97; *Lapham v. Curtis*, 5 Vt. 371; and cases cited under § 683, *ante*, notes 6, 7, 8; § 688a, *ante*, note 2.

⁸ *Campbell v. Seaman*, 63 N. Y. 568; *Frost v. Berkley Phosphate Co.*, 42 S. C. 402; 20 S. E. 280; and see

§ 702. **Dangerous structures.**—The owner of land is bound to use ordinary care and vigilance to keep not only the land but the structures thereon in a condition of reasonable repair and security, so that no injury, by reason of any insecurity or insufficiency for the purpose to which they are put,¹ will result to adjoining premises, or to any person near or upon his land, by virtue of a right and not under a bare license.² Examples of liability for a violation of this duty are found in cases of chimneys or walls falling by reason of faulty construction,³

Kankakee Water Co. v. Reeves, 45 Ill. App. 285; and all cases cited under note 2, *supra*.

¹ No one is under obligation to render his premises safe for any purpose for which he could not reasonably anticipate that they would be used (*Armstrong v. Medbury*, 67 Mich. 250; 34 N. W. 566). In *Brunswick Co. v. Rees* (69 Wisc. 442; 34 N. W. 732) owner held liable for letting premises knowing them to be unfitted for tenant's purpose. A structure, at a bathing place, of great height, running out into shallow water and having no ready means of access, and so narrow on top that only a person of athletic ability could keep his balance while on it, held not so clearly designed to be used by divers as to charge the proprietor with responsibility for the death of one diving therefrom (*Hinz v. Starin*, 46 Hun, 526). For further illustrations, see note 1, § 705, *post*.

² See § 705, *post*.

³ *Cork v. Blossom*, 162 Mass. 330; 38 N. E. 495 [chimney]. In *Cleg-horn v. Taylor* (18 Dunlop, 664), damage was done to an adjoining property by a chimney-can, which had been put up in an insecure manner, falling from defendants' house. The defendants argued that, there having been no personal fault on their part, and skilled workman having been employed, they were not liable for injuries caused by the

insufficiency of the work. The court held the proprietor liable. The tenant of the premises trespassed upon may have an action for the injury to his possession, as well as may the reversioner, under the statute, for the injury to the reversion (*Gourdier v. Cormack*, 2 E. D. Smith, 200; *Hardrop v. Gallagher*, Id. 523). On the same principle, one who, with knowledge of its decayed condition, allows a tree to stand in such a position that it falls upon an adjacent house (*Gibson v. Denton*, 4 N. Y. App. Div. 198; 38 N. Y. Supp. 554), or into the highway (see cases cited under §§ 343, 354, *ante*), is liable for an injury which could be reasonably anticipated. In *Ryder v. Kinsey* (62 Minn. 85; 64 N. W. 94), the brick veneer of a wall fell, through the failure of the builder to anchor the same to the sheathing of the wall, as was proper and customary. Held, owner was not liable for the fall, in the absence of evidence that by his exercising ordinary care before the wall fell he might have discovered the defect therein. A charge that, if the wall fell by reason of an extraordinary rain-storm, and defendant used such care in its construction as persons of ordinary prudence would exercise under the same circumstances, defendant was not liable, is proper (*Couts v. Neer*, 70 Tex. 468; 9 S. W. 40). See *Butler v. Cushing*, 46 Hun,

or by reason of natural dilapidation,⁴ or of the destruction of the building to which they belong by fire or otherwise;⁵ and the fact of the fall is generally sufficient evidence of negligence to put the burden of proof on the owner.⁶ Not so, however,

521; *Judd v. Cushing*, 50 Hun, 181; 2 N. Y. Supp. 836; *Hine v. Cushing*, 53 Id. 519; 6 N. Y. Supp. 850. In last case, held, that a conflagration is the natural and proximate result of the fall of a building in which fires are used, and which is itself inflammable, and contains a large amount of inflammable material, and that one by whose negligence the building falls is liable for damages caused by its burning. A contractor who has completed a building, and turned it over to the owner, is not liable to a third person, who is afterwards injured in an accident caused by the defective construction of the building, since the contractor's duty is only to the owner (*Curtain v. Somerset*, 140 Pa. St. 70; 21 Atl. 244; *Daugherty v. Herzog*, 145 Ind. 255; 44 N. E. 457).

⁴ A brick fell on a passer-by in street, in consequence of the dilapidated condition of the wall of the house. Owner held liable (*Murray v. McShane*, 52 Md. 217). See *Striker v. Plath*, 19 N. Y. App. Div. 376; 46 N. Y. Supp. 585 [iron shutter fell: owner not liable, on proof that third person pried it off its hinges]; *Woods v. Trinity Parish*, 21 D. C. 540 [nearly same].

⁵ Where the walls of an edifice were negligently permitted to stand after the rest of the building had been destroyed by fire, and a part of the wall afterward fell upon a person, the owner was held liable (*Church of the Ascension v. Buckhart*, 3 Hill, 193; *Glover v. Mersman*, 4 Mo. App. 90; *Lynds v. Clark*, 14 Id. 74; and see *Seabrook v. Hecker*, 2 Robert-son, 291; *Schell v. Second National*

Bank, 14 Minn. 43; *Schwartz v. Gilmore*, 45 Ill. 455). See other cases cited under §§ 343, 354, *ante*. The owner is liable, although the walls were at the time in the charge of a contractor (*Sessengut v. Posey*, 67 Ind. 408), or of an insurance company which had elected to repair the building, under the terms of its policy (*Steppe v. Alter*, 48 La. Ann. 363; 19 So. 147).

⁶ Cases cited under §§ 59, 60; also *Houston v. Brush*, 66 Vt. 331; 29 Atl. 380; [derrick]; *Reynolds v. Van Beuren*, 10 N. Y. Misc. 703; 31 N. Y. Supp. 827 [sign-board]; *Schachne v. Barnett*, 58 N. Y. Superior, 145; 8 N. Y. Supp. 717 [stone slab fell from fire escape]; *Skelton v. Larkin*, 82 Hun, 388 [flagstone standing against tree]; *Morris v. Strobel*, etc. Co., 81 Hun, 1; 30 N. Y. Supp. 571 [sign-board]; *Colelli v. N. J. Concentrating Works*, 87 Hun, 428; 34 N. Y. Supp. 310 [fall of part of house frame during erection]; *Pasquini v. Lowry*, 63 Hun, 632; 18 N. Y. Supp. 284 [fall of iron work during construction of building]; *Wittenberg v. Tietz*, 8 N. Y. App. Div. 439; 40 Supp. 899; [fall of floor of building in course of construction]; *Guldseth v. Carlin*, 19 N. Y. App. Div. 588; 46 N. Y. Supp. 357 [brick]; *Giles v. Diamond*, etc. Co. [Del.], 8 Atl. 368 [wall]; *Martin v. Dufalla*, 50 Ill. App. 371 [wall]; *St. Louis, etc. R. Co. v. Hopkins*, 54 Ark. 209; 15 S. W. 610 [sign-board]; *Knoop v. Alter*, 47 La. Ann. 570; 17 So. 139; *Dixon v. Pluns*, 98 Cal. 384; 33 Pac. 268. The fact that the walls fell because of the accidental pulling of an electric wire attached to them

of a wall which falls during, and because of, a fire in the building; in which case, defects in the material or manner of its construction must be shown.⁷ Of course, the owner is entitled to a reasonable time after a fire to remove a ruined wall, and the question of reasonableness is for the jury.⁸ The general rule is, however, that actual notice of the dangerous condition of a building is not necessary in order to fix the liability of an owner in possession.⁹ A land-owner may, unless restrained by statute, erect and maintain fences on his own land, or on his part of a division line, or on a highway frontage of any height¹⁰ or material;¹¹ and he is not liable for injuries to per-

by a third party will not relieve the owner if he knew, or might, in the exercise of ordinary care, have known, that the wires were so attached (*O'Conner v. Andrews*, 81 Tex. 28; 16 S. W. 628). Compare *Cross v. Koster*, 17 N. Y. App. Div. 402; 45 N. Y. Supp. 215. The several owners of three adjacent lots, upon which stand three brick buildings, with a common front wall, to which the partition walls attach, are jointly liable for the falling of this front wall, which (the rest of the buildings having been destroyed by fire) was allowed to remain standing for a month after the fire, though dangerously insecure all that time (*Simmons v. Everson*, 124 N. Y. 319; 26 N. E. 911).

⁷ *Kitchen v. Carter*, 47 Neb. 776; 66 N. W. 855 [wall fell on fireman]. The owner of a building reasonably safe for the ordinary purposes of commerce is not obliged to strengthen it against extraordinary emergencies, such as the additional strain caused by throwing large quantities of water on the merchandise therein to check a fire (*Woodruff v. Bowen*, 136 Ind. 431; 34 N. E. 1113). See *Stone v. Hunt*, 114 Mo. 66; 21 S. W. 454 [negligence in taking down building].

⁸ In *Dixon v. Wachenheimer* (9 Ohio C. C. 40; s. c., 3 Ohio Dec. 11),

held, error to charge that in determining what was a reasonable time for the removal of a wall of a burned building Sunday should be excluded, unless the wall was notoriously and imminently in danger of falling. Ten days is amply sufficient time (*Anderson v. East*, 117 Ind. 126; 19 N. E. 726).

⁹ *Dickson v. Hollister*, 123 Pa. St. 421; 16 Atl. 484; *Woods v. Trinity Parish*, 21 D. C. 540; *Franke v. St. Louis*, 110 Mo. 516; 19 S. W. 938. The fact that the building was made unsafe by the acts of trespassers, which it was within the power of the owner to prevent, is immaterial (*Tucker v. Illinois Cent. R. Co.*, 42 La. Ann. 114; 7 So. 124).

¹⁰ See *Rideout v. Knox*, 148 Mass. 368; 19 N. E. 390.

¹¹ Maintenance of a barbed-wire fence on one's premises along a highway, though in a city, if not prohibited by ordinance, is not negligence *per se*, and, in the absence of other evidence showing it a nuisance, its owner will not be liable for injury to stock occasioned thereby (*Robertson v. Wooley*, 5 Tex. Civ. App. 237; 23 S. W. 828; *Worthington v. Wade*, 82 Tex. 26; 17 S. W. 520; *Colvin v. Sutherland*, 32 Mo. App. 77; *Foster v. Swope*, 41 Id. 137; and cases in next note).

sons or animals coming in contact with them, provided they are not made dangerous by their manner of construction, *e. g.*, drawing the wires of a barbed wire fence so loosely that animals are likely to become entangled in them, or setting the posts so far apart that the wires sag in such a manner as to induce animals on the highway or in an adjoining pasture to attempt crossing over them.¹²

§ 702a. Violation of building laws: fire escapes.—In most states, if not all, the owners and lessees of certain classes of buildings, exceeding a specified number of stories in height, such as factories, hotels and tenement-houses, are required by statute to provide extra precautions for the escape of the occupants in case of fire, by supplying ropes, outside ladders, doors or other appliances to that end; and as the common law imposes no such duty,¹ the statute usually gives a right of action to any one who sustains an injury due to the absence or insufficiency of such appliances.² But a defect complained of must be one which affects the safety of the appliance for the purpose for which it was designed.³ Under such an imposed

¹² *Roney v. Aldrich*, 44 Hun, 320; *Rehler v. Western N. Y., etc. R. Co.*, 55 Id. 604; 8 N. Y. Supp. 286; *Rowland v. Baird*, 18 Abb. N. C. 256; *Sisk v. Crump*, 112 Ind. 504; 14 N. E. 381; *McFarland v. Swihart*, 11 Ind. App. 175; 38 N. E. 483; *Loveland v. Gardner*, 79 Cal. 317; 21 Pac. 766. See *Worthington v. Wade*, 82 Tex. 26; 17 S. W. 520; *Galveston Land Co. v. Levy*, 10 Tex. Civ. App. 104. So one who, in erecting a division barbed-wire fence, lays the wire on the ground without protection, is liable for injuries therefrom to an adjoining land-owner's stock (*Lowe v. Guard*, 11 Ind. App. 472; 39 N. E. 428). *S. P., Gooch v. Bowyer*, 1 Mo. App. Rep'r, 531.

¹ *Pauley v. Steam Gauge, etc. Co.*, 131 N. Y. 90; 29 N. E. 999; 30 Id. 865; rev'g 61 Hun, 254; 16 N. Y. Supp. 820.

² So in New York (L. 1882, c. 410;

applicable only to N. Y. city; L. 1887, c. 720, is general). In *Willy v. Mulledy* (78 N. Y. 310), held, that the fact that the tenant first learned of the absence of a fire escape after the hiring, will not prevent a recovery, under the statute, it not appearing that a reasonable time within which to quit had elapsed since acquiring the knowledge.

³ *McAlpin v. Powell*, 70 N. Y. 126 [tenant's boy of ten allowed to sit on window sill with feet resting on fire escape platform; trap-door insecurely fastened gave way and boy fell through; no recovery]. Owner owes tenant no duty to maintain a trap-door from a balcony of a fire escape, which is not connected with any common passageway, in a safe condition for use by the tenant as a platform to facilitate the drying of clothes (*Mayer v. Laux*, 18 N. Y. Misc. 671).

obligation, the initial duty is on the owner, who, notwithstanding a provision that such appliances shall be erected as may be directed and approved by a designated officer;⁴ but it is held that unless directed to do so by the officer, the owner is not bound to adopt *all* the several appliances directed by the statute, if the means actually provided furnished an equally safe and convenient way of escape.⁵ The officer's certificate approving the appliances adopted will not relieve the owner from responsibility for defects therein, *e. g.*, providing a safe landing place,⁶ nor, on the other hand, will the absence of such certificate impose on him any obligation which would not otherwise arise from the facts, but it puts on him the burden of showing that he has complied with the statute by building such escapes as it requires, or other permanent, safe, external escapes substantially equivalent.⁷ Ignorance of the absence of the statutory appliances, on the part of one upon whom is imposed the duty of providing them, will not relieve him from responsibility.⁸

⁴ So held under the New York statute, L. 1888, c. 583, § 16 (*McLaughlin v. Armfield*, 58 Hun, 376; 12 N. Y. Supp. 164); and under the Ohio statute (*Rose v. King*, 49 Ohio St. 213; 30 N. E. 267). Under the New Jersey Act March 24, 1890 (P. L. 101), it is not obligatory on an owner to erect a fire escape until precedent action is taken by the municipality in which the building is located prescribing the number, dimensions, character, manner of construction and erection of the fire escapes (*De Ginther v. New Jersey Home, etc.* [N. J. Ct. of Err.], 33 Atl. 968). So held also, in effect, under the Rhode Island statute (*Maker v. Slater Mill, etc. Co.*, 15 R. I. 112).

⁵ *Pauley v. Steam Gauge, etc. Co.*, 131 N. Y. 90; 29 N. E. 999. In *Gorman v. McArdle* (67 Hun, 484; 22 N. Y. Supp. 479), defendant did not provide a fire escape on the outside of the building, as required by L. 1887,

ch. 462, but did provide an equally safe and convenient escape through a door from the working room to the roof of an adjoining building. Held, this was a substantial compliance with the statute. As to inadmissibility of opinions that means of egress were sufficient, see *Schwander v. Birge*, 46 Hun, 66.

⁶ *Johnson v. Steam Gauge, etc. Co.*, 72 Hun, 535; 25 N. Y. Supp. 689. In that case, plaintiff was injured in escaping from a burning factory, by dropping from the lower rung of the fire escape into a chute leading into an area way twenty feet below.

⁷ *Sewell v. Moore*, 166 Pa. St. 570; 31 Atl. 370. An official certificate of approval of the fire escapes erected by defendant, issued after the fire, held not admissible (*Ib.*).

⁸ *McLaughlin v. Armfield*, 58 Hun, 376; 12 N. Y. Supp. 164. But compare *Pitcher v. Lennon* (12 N. Y. App. Div. 356; 38 N. Y. Supp. 1007),

§ 703. Liability to travelers on adjoining highway. —

Where an abutting owner's title runs to the middle of the street, subject only to the public's right of way over the surface, he is "at liberty to use the space under it as he may any other part of his property."¹ And, unless prohibited by law or ordinance, he is entitled to have an opening upon the surface of the highway leading to structures underneath.² Where, however, the fee of the soil of the highway is vested in a municipality, such an opening, without its license, express or implied,³ is a nuisance *per se*, for which the author is liable without proof of negligence in maintaining it.⁴ When constructed under a license, if one is required, or under a right, as in most cases, vaults and chutes, with scuttles opening on a sidewalk, provided they do not imperil the safety of travelers, only become nuisances when they are either defectively constructed, or are allowed to become dangerous to travelers by being left open, or unguarded, or insecure from wear or other remediable

where it was held that proof of owner's knowledge that statute had been violated was essential.

¹ Per Rapallo, J., *McCarthy v. Syracuse*, 46 N. Y. 194. The dedication of land for a public highway confers a mere easement for public use as a highway, and the land-owner retains the right to use the land for any lawful purpose compatible with the full enjoyment of the public easement (*Ellsworth v. Lord*, 40 Minn. 337; 42 N. W. 389).

² *McCarthy v. Syracuse*, *supra*; and cases cited in note 4, *infra*.

³ A license to construct opening of coal hole in sidewalk will be inferred from eighteen years' acquiescence without objection from the city (*Jennings v. Van Schaick*, 108 N. Y. 530). *s. p.*, *Robbins v. Chicago*, 4 Wall. 657; *O'Linda v. Lothrop*, 21 Pick. 292; *Babbage v. Powers*, 54 Hun. 635, *mem.*; 7 N. Y. Supp. 306 [nine years' user]; *McGrath v. Walker*, 64 Hun. 179; 18 N. Y. Supp. 915. Authority to build coal hole in

sidewalk may be implied, in the absence of any action by public authorities, being aware of the work, to stop it (*Nelson v. Godfrey*, 12 Ill. 22).

⁴ *Congreve v. Smith*, 18 N. Y. 79; *Clifford v. Davis*, 81 Id. 52. These cases relate to streets in New York city which, as a corporation, is vested with the fee of the soil of its streets; and ordinances prohibit the construction of house-vaults under sidewalks without the consent of the municipality. A ruling, therefore, as in these cases, that the building of such a vault without authority, if it materially obstructs travel, is wrongful and subjects the wrongdoer to liability to a traveler, irrespective of any question of care and diligence on his part, is not in conflict with the cases cited in next note. See *Adams v. Fletcher*, 17 R. I. 137; 20 Atl. 263; and *Fisher v. Thirkell*, 21 Mich. 20, where these cases are commented on. Also see *Dillon on Mun. Corp.*, § 656b.

cause.⁵ Actual notice of such defects is not necessary if by due diligence they were discoverable.⁶ It has been held that one whose title extends to the middle of a street is chargeable with notice that he is the owner of a tree planted on the sidewalk in front of his property, and of his liability, as such, for injuries to wayfarers occasioned by his allowing it to become dangerous.⁷ An abutting owner who invites the public to treat, as belonging to the sidewalk, a part of his premises which he connects therewith, either on the same level⁸ or by a raised platform,⁹ is liable as for maintaining a nuisance for dangerous openings or similar defects thereon.¹⁰ He is likewise liable for maintaining an unguarded excavation on his own premises so

⁵ *McGuire v. Spence*, 91 N. Y. 303 [uncovered area in sidewalk]; *Jennings v. Van Schaick*, 108 Id. 530; 15 N. E. 424 [same]; *Wells v. Sibley*, 56 Hun. 644; 9 N. Y. Supp. 342 [open manhole]; *Blaechinska v. Howard Mission*, 56 Hun. 322; 9 N. Y. Supp. 679 [portion of cover missing]; *Wasson v. Pettit*, 49 Hun. 166; 1 N. Y. Supp. 613; *Dickson v. Hollister*, 123 Pa. St. 421; 16 Atl. 434; *Stevenson v. Joy*, 152 Mass. 45; 25 N. E. 78; *Adams v. Fletcher*, 17 R. I. 137; 20 Atl. 263; *Fisher v. Thirken*, 21 Mich. 1; *Johnson v. McMillan*, 69 Id. 36; 36 N. W. 803; *Korte v. St. Paul Coal Co.*, 54 Minn. 530; 56 N. W. 246; *Hutson v. King*, 95 Ga. 271; 22 S. E. 615; *Van Praag v. Gale*, 107 Cal. 438; 40 Pac. 555; *Gordon v. Peltzer*, 56 Mo. App. 599. See other cases cited in notes 11-15, § 343, *ante*, and under § 709, *post*. For cases holding city liable, see note 8, § 353, *ante*.

⁶ *Stevenson v. Joy*, 152 Mass. 45; 25 N. E. 78.

⁷ *Weller v. McCormick*, 52 N. J. Law, 470; 19 Atl. 1101; *rev'g* 47 N. J. Law, 397; 1 Atl. 516. Compare *Fuchs v. Schmidt*, 8 Daly, 317.

⁸ *Beck v. Carter*, 68 N. Y. 283 [excavation ten feet from line of alley used by public]; *Brezee v. Powers*

[Mich.], 45 N. W. 130; *Landrue v. Lund*, 38 Minn. 538; 39 N. W. 699.

⁹ *Tomle v. Hampton*, 129 Ill. 379; 21 N. E. 800. In *Stackhouse v. Vendig* (166 Pa. St. 582; 31 Atl. 349), a cellar door was properly constructed, was within the prescribed limits, and, when the accident occurred was only slightly open, and did not project as high above the sidewalk as an ordinary door step or porch. Held, defendants were not negligent.

¹⁰ The fact that such opening is necessary to give light to the basement under defendant's store does not relieve him of liability, when it appears that the opening could have been protected by a railing so as to render it safe without impairing its usefulness (*Tomle v. Hampton, supra*). Where an abutting owner moved his building back from the street, and paved a sidewalk on her land, it is a question for the jury whether she thereby invites to cross her land one who is injured by defects in the walk (*Holmes v. Drew*, 151 Mass. 578; 25 N. E. 22). He is of course liable for negligence in unduly encumbering the sidewalk with his goods, by which a passer-by is injured (*McCarten v. Flagler*, 69 Hun. 134; 23 N. Y. Supp. 263; *Strong v. Pickering Hardware Co.*, 9 Ohio C.

near a highway as to be dangerous, under ordinary circumstances, for travelers on the way, using ordinary care to keep upon the proper path;¹¹ and although a traveler goes upon the land, in order to avoid the excavation, the fact of such entry does not bar his right of recovery.¹² Where the excavation is at a considerable distance from the public path, there can be no question that the owner or occupant is not liable to a mere stranger falling therein, whether consciously¹³ or unconsciously.¹⁴

C. 249 and cases cited under § 362, *ante*). See *Brunker v. Cummins*, 133 Ind. 443; 32 N. E. 732; *Kelly v. Cohoes Knitting Co.*, 8 N. Y. App. Div. 156; 40 N. Y. Supp. 477.

¹¹ In *Howland v. Vincent* (10 Metc. 371), the owner, who left an unguarded excavation within a foot or two of the street, was held not to be liable to one who stepped from the sidewalk, in the dark, and fell into it. This case has been discredited both in New York and Connecticut (*Beck v. Carter*, 6 Hun, 604; *affi'd*, 68 N. Y. 283; *Norwich v. Breed*, 30 Conn. 535); and is not in harmony with the English rule (*Barnes v. Ward*, 9 C. B. 392). In the last case, defendant was held liable for leaving a large hole close to the sidewalk. So he was in *Hadley v. Taylor* (L. R. 1 C. P. 53), for having an open hoistway fourteen inches from the highway; in *Graves v. Thomas* (95 Ind. 361), for extending an unguarded excavation to the sidewalk; in *Haughey v. Hart* (62 Iowa, 96; 17 N. W. 189), for leaving a well unprotected on uninclosed land adjacent to a highway where stock ran at large; following the decision in *Young v. Harvey* (16 Ind. 314). See also, *Findlay Brewing Co. v. Bellman*, 9 Ohio C. C. 277; *Malloy v. Hibernia Sav. Soc.* [Cal.], 21 Pac. 525; *Houston v. Traphagen*, 47 N. J.

Law, 23; *Atlanta, etc. R. Co. v. Wood*, 48 Ga. 565. A lot-owner is not justified in leaving an excavation near the sidewalk, though there is a good sidewalk on the opposite side of the street (*Stuart v. Havens*, 17 Neb. 211. Compare *Kohn v. Levett*, 44 Ga. 251). It is negligence to leave an open pit adjacent to the highway, known to be frequented by stock running at large (*Haughey v. Hart*, 62 Iowa, 96; 17 N. W. 189). See, also, *Buesching v. St. Louis Gas Co.*, 73 Mo. 219; *Birge v. Gardner*, 19 Conn. 507; *Homan v. Stanley*, 66 Pa. St. 464; *Temperance Hall Asso. v. Giles*, 33 N. J. Law, 260.

¹² *Vale v. Bliss*, 50 Barb. 318; *Sanders v. Reister*, 1 Dak. 151; 46 N. W. 680.

¹³ *Blyth v. Topham*, Cro. Jac. 158; *Knight v. Abert*, 6 Pa. St. 472; *Turner v. Thomas*, 71 Mo. 596. Defendant held not liable for leaving a reservoir unguarded, twenty feet from the highway (*Hardcastle v. So. Yorkshire R. Co.*, 4 Hurlst & N. 67); or an area unguarded, thirty feet from the sidewalk (*Kelley v. Columbus*, 41 Ohio St. 263); or an uncovered well, eighty feet from the nearest road, into which a boy of eight fell (*Gillespie v. McGowan*, 100 Pa. St. 144); or partly concealed water-hole twenty-five feet from street (*Grindley v. McKechie*, 163

¹⁴ *Hounsell v. Smyth*, 7 C. B. N. S. 731.

§ 704. **Liability to business visitors.** — The occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business,¹ or for any other purpose beneficial to him; or, if his premises are in any respect dangerous, he must give such

Mass. 494; 40 N. E. 764). In Connecticut, the doctrine is that liability depends not so much upon the nearness of the excavation to the highway as upon the fact whether

or not, under all the circumstances, it is dangerous (*Croghan v. Schiele*, 53 Conn. 186; *Norwich v. Breed*, 30 Id. 535).

¹*Carleton v. Franconia Iron, etc. Co.*, 99 Mass. 216; *Chapman v. Rothwell*, El. Bl. & E. 168; *Smith v. London, etc. Docks Co.*, L. R. 3 C. P. 326; *Tebbutt v. Bristol, etc. R. Co.*, L. R. 6 Q. B. 73; *Holmes v. Northeastern R. Co.*, L. R. 4 Exch. 254; *aff'd*, 6 Id. 123; *Freer v. Cameron*, 4 Rich. Law, 238; *Schmidt v. Bauer*, 80 Cal. 565; 22 Pac. 256; and all cases cited under this section. The following persons, present by invitation, recovered for injuries: one who had been sent for to repair an engine in a hotel (*Homer v. Everett*, 47 N. Y. Superior, 298); a workman on a scaffold erected by defendant for putting up cornice on its own building (*Coughtry v. Globe Woolen Co.*, 56 N. Y. 124); a customer invited to look at goods in a part of the store not intended for or generally used by customers (*Welch v. McAllister*, 15 Mo. App. 492 [room dark; unguarded hatchway]); driver bringing load of grain to defendant's warehouse (*Nave v. Flack*, 90 Ind. 205 [defective driveway]); proposed purchaser in lumber yard, on whom a pile of lumber fell, although the direct cause of fall was a stranger's careless driving (*Pastene v. Adams*, 49 Cal. 87); a policeman at request of a tenant entering a building to make an ar-

rest (*Learoyd v. Godfrey*, 138 Mass. 315 [unprotected well]; see *Parker v. Barnard*, 135 Mass. 116); a mail-carrier visiting mail boxes in hallway for convenience of tenants (*Gordon v. Cummings*, 152 Mass. 513; 25 N. E. 978 [landlord liable as on his implied invitation]); an iceman delivering ice to a tenant in an apartment house (*Turnier v. Lathers*, 59 Hun, 623; 13 N. Y. Supp. 500). See cases cited in note 3, § 708, *post*. Compare *Pelton v. Schmidt*, 97 Mich. 231; 56 N. W. 689 [teamster delivering goods]. It is culpable negligence to leave a pit or other excavation in such an unguarded state as to cause injury to a person having a right to be upon the land, and using that right with ordinary care (*Williams v. Groucott*, 4 Best & S. 149; see *Beck v. Carter* 68 N. Y. 283; *Bond v. Smith*, 113 Id. 378; 21 N. E. 128). Defendant may show, by way of defense, that the soil was so rocky that it was almost impossible to set posts therein to fence a collection of water (*Overholt v. Vieths*, 93 Mo. 422; 6 S. W. 74). One who knows the condition of a sand bank from which he was taking sand, in which work he was experienced, cannot recover for the caving in of the bank on him (*Carr v. Sheehan*, 81 Hun, 291; 30 N. Y. Supp. 753).

visitors sufficient warning of the danger to enable them, by the use of ordinary care, to avoid it.² The extent, however, of his legal obligation is to use ordinary care and prudence to keep his premises in such condition that visitors may not be unnecessarily or unreasonably exposed to danger;³ and the mere fact that one is injured while on the premises is no evidence of negligence on the part of the proprietor.⁴ The same, but no greater, degree of care is required of a proprietor who receives compensation for the use of premises, *e. g.*, a wharf-owner who receives payment for the use of his wharf,⁵ a railroad company, with respect to its yard or platform⁶ or other structures, or the occupant of premises used for public entertainment, and charging an admission fee.⁷ And in such cases, persons using the property in the manner in which it was intended

² *Indermaur v. Dames*, L. R. 2 C. P. 311 [absence of light near unfenced shaft]. But where, in going along a dark passage, plaintiff fell down an ordinary staircase, held that he could not recover, as he ought to have taken a light with him (*Wilkinson v. Fairrie*, 1 Hurlst. & C. 633). Nor could the fact that defendant's servant directed him to go where he did, make any difference (*Ib.*).

³ *Larkin v. O'Neill*, 119 N. Y. 221; 23 N. E. 563; *rev'g* 48 Hun, 591; 1 N. Y. Supp. 232. In that case, held that a failure to put brass plates or rubber pads upon a properly carpeted stairway, composed of eleven steps, each fifteen feet long, was not negligence, nor was it negligent to stand a lay figure on such stairway.

⁴ *Larkin v. O'Neill*, *supra*. In *Pinney v. Hall* (156 Mass. 225; 30 N. E. 1016), plaintiff fell down stairway. There being no evidence that the stairway was defectively lighted, held defendant was not liable. S. P., *Johnson v. Ramberg*, 49 Minn. 341: 51 N. W. 1043.

⁵ See § 725, *post*.

⁶ *Bennett v. Louisville, etc. R. Co.*, 102 U. S. 577; *Weston v. N. Y.*

Elevated R. Co., 73 N. Y. 595; *Dobiecki v. Sharp*, 88 Id. 203; *Clussman v. Long Island R. Co.*, 9 Hun, 618; *Collins v. N. Y., New Haven, etc. R. Co.*, 55 Superior, 31, 38; and cases cited under §§ 410, 492*a*, *ante*.

⁷ *Currier v. Boston Music Hall*, 135 Mass. 414; *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Camp v. Wood*, 76 N. Y. 92; *Butcher v. Hyde*, 152 N. Y. 142; 46 N. E. 305 [theater staircase]; *Brown v. South Kennebec Ag. Soc.*, 47 Me. 275 [fair ground]; *Latham v. Roach*, 72 Ill. 179 [same]; *Conrad v. Clauve*, 93 Ind. 476 [licensed target-shooting on fair ground]; *Emery v. Minneapolis Exposition*, 56 Minn. 460; 57 N. W. 1132 [fall of window sash having no weights]. Keepers of bathing beaches are bound to active vigilance to keep the grounds to which bathers are invited from becoming dangerous, and cannot escape responsibility for a hole under water in which a bather was drowned simply by showing that they did nothing to produce the hole (*Dinniham v. Lake Ontario Imp. Co.*, 8 N. Y. App. Div. 509; 40 N. Y. Supp. 764). S. P., *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563; 67 N. W. 479 [bathing re-

to be used have a right to presume that it is in fit condition for such use;⁸ and they are not guilty of contributory negligence in failing to anticipate and protect themselves against defects in the property, of which they were not warned.⁹ But no one is exempt from the obligation of observing where he is going,¹⁰ especially in parts of the premises not intended for general use, to which he was not invited.¹¹ In entering or leaving premises, the visitor is bound to use the ordinary and customary place of ingress and egress, and if he adopts some other way, he becomes a mere licensee, and cannot recover for defects outside, or not substantially adjacent to the regular way.¹²

sort, without provision for rescuing bathers]. See *Hinz v. Starin*, 46 Hun, 526.

⁸ *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501. But on the lease of a building for exhibition purposes, the galleries being designed only for a limited number of spectators, there is no implied warranty that they shall be safe for a turbulent crowd (*Edwards v. N. Y. & Harlem R. Co.*, 98 N. Y. 245).

⁹ *Pittsburgh v. Grier*, 22 Pa. St. 54. The text sustained in the case of a wharf-owner and his agent, who were held severally liable from the circumstances of the case (*Campbell v. Portland Sugar Co.*, 62 Me. 552). There being two entrances to a store, both of which were used, it was not contributory negligence to enter by the smaller way, where there was no warning of any danger from descending goods (*O'Callaghan v. Bode*, 84 Cal. 489; 24 Pac. 269). It was not contributory negligence for plaintiff to use a stairway in a building rented for offices, though he knew it to be dark, and was cautioned to use care, when the elevator had stopped running, and there was no other way of getting out of the building (*Marwedel v. Cook*, 154 Mass. 235; 28 N. E. 140).

¹⁰ It is for the jury to say whether a

customer in a store is negligent in keeping her eyes fixed on articles in the show-case, rather than on the floor, by reason of which she fails to see an open register hole, into which she falls (*Hendricken v. Meadows*, 154 Mass. 599; 28 N. E. 1054). A projection in the entrance steps of a building being plainly visible, a woman ascending them is guilty of contributory negligence in not lifting the skirt of her dress to escape contact with the projection (*Allis v. Columbian University*, 19 D. C. 270).

¹¹ *Hart v. Grinnell*, 122 N. Y. 371; 25 N. E. 354 [plaintiff tripped over handle of truck in plain sight, in a passage-way in rear part of store where customers had no occasion to go]; *Gaffney v. Brown*, 150 Mass. 479; 23 N. E. 233 [guest of public dining-room, for purpose of retiring, opened side door, and without stopping to observe, fell down stairway on which door opened]. On nearly same facts, held a nonsuit was properly granted (*Sweeney v. Barrett*, 151 Pa. St. 600; 25 Atl. 148). See other cases cited under next section.

¹² *Armstrong v. Medbury*, 67 Mich. 250; 34 N. W. 566; *Allen v. Johnston*, 76 Mich. 31; 42 N. W. 1075; *Bedell v. Berkey*, 76 Mich. 435; 43 N. W. 308.

§ 705. Liability to person entering under bare license. —

A mere passive acquiescence, on the part of the owner or occupant, in the use of real property by others, does not involve him in any liability to them for its unfitness for such use.¹ They take all risks upon themselves, and have no right

¹ *Splitstorf v. State*, 108 N. Y. 205 ; 15 N. E. 322 [state canal-bridge not built for public use] ; *Donahue v. State*, 112 N. Y. 142 ; 19 N. E. 419 ; *Miller v. Woodhead*, 104 N. Y. 471 ; 11 N. E. 57 ; *Cusick v. Adams*, 115 N. Y. 55 ; 21 N. E. 673 [private bridge] ; *Nicholson v. Erie R. Co.*, 41 N. Y. 525 [railroad crossing] ; *Sutton v. N. Y. Central R. Co.*, 66 Id. 243 [same] ; *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301 ; 39 N. E. 1068 [railroad grounds : short cut between two streets] ; *Stenger v. Van Sicklen*, 132 N. Y. 499 ; 30 N. E. 987 ; *Redigan v. Boston & Maine R. Co.*, 155 Mass. 44 ; 28 N. E. 1133 [station grounds] ; *Walker v. Winstanley*, 155 Mass. 301 ; 29 N. E. 518 ; *Reardon v. Thompson*, 149 Mass. 267 ; 21 N. E. 369 [excavation in private way] ; *Sweeny v. Old Colony, etc. R. Co.*, 10 Allen, 368 ; *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129 ; *Gautret v. Egerton, L. R.* 2 C. P. 371 ; *Hounsell v. Smyth*, 7 C. B. N. S. 731 ; *Pittsburgh, etc. R. Co. v. Bingham*, 29 Ohio St. 364 [railroad crossing] ; *Evansville, etc. R. Co. v. Griffin*, 100 Ind. 221 [footpath to railroad building] ; *Morgan v. Penn. R. Co.*, 19 Blatchf. 239 [same] ; *Watson v. Oxanna Land Co.*, 92 Ala. 320 ; 8 So. 770 [private bridge] ; *Louisville, etc. Canal Co. v. Murphy*, 9 Bush, 522 [private bridge open to free use of public for thirty years] ; *Lepnick v. Gaddis*, 72 Miss. 200 ; 18 So. 319 ; *Clarkin v. Biwabik-Bessemer Co.*, 65 Minn. 483 ; 67 N. W. 1020. See distinction *as to use* insisted upon in *Weston v. N. Y. Elevated R. Co.*, 73 N. Y. 595 ; also *McNeven*

v. Arnott, 4 N. Y. App. Div. 133 ; 38 N. Y. Supp. 759. See on the same point in respect to personal property, *Lygo v. Newbold*, 9 Exch. 302. Defendant held not liable, where plaintiff had gone with a crowd to his piazza to escape a storm ; and it broke down (*Converse v. Walker* 30 Hun, 596). In *Woolwine v. Chesapeake, etc. R. Co.* (36 W. Va. 329 ; 15 S. E. 81), plaintiff made a friendly call, without invitation, on operator in defendant's telegraph office. Held, defendant owed him no duty to keep the premises in safe condition. *s. p.*, *Poling v. Ohio River R. Co.*, 38 W. Va. 645 ; 18 S. E. 782 [plaintiff standing on company's premises to watch postal clerk in mail car take mail pouch from mail crane, struck by defective crane]. Where a sign of "no admittance" is placed on a door, one who enters the room (being of the class meant to be excluded) cannot recover for injuries caused by negligence in the management of the room, even though no attempt was made to exclude him, nor any further warning given (*Zoebisch v. Tarbell*, 10 Allen, 385 ; *Victory v. Baker*, 67 N. Y. 366). *s. p.*, *Donnelly v. Boston & Maine R. Co.*, 151 Mass. 210 ; 24 N. E. 38 ; *McCarthy v. Foster*, 156 Mass. 511 ; 31 N. E. 385 [notice posted prohibiting all persons using elevator, "as it is considered dangerous and unsafe"]. In *Clarke v. Rhode Isl. El. Light Co.* (16 R. I. 463 ; 17 Atl. 59), held, that a sign warning the public of danger in a private gangway referred only to the danger of vehicles passing

to complain of any defect in the premises, even though caused by the direct act of the owner (*e. g.*, a pit sunk in the land),² unless the act is malicious or is committed with notice of the fact that strangers are likely to approach, and without any effort to warn them of the danger, under circumstances which justify a belief that the owner was indifferent to the injuries which might happen to them.³ Much less can they complain

when way was obstructed by unloading, etc., of merchandise, and did not absolve owner from liability for injuries to a visitor passing out that way, caused by fall of a ladder standing there.

² "The rule is, that he who enjoys the permission or passive license is only relieved from the responsibility of being a trespasser, and must assume all the ordinary risks attached to the nature of the place or the business carried on" (*Vanderbeck v. Hendrey*, 34 N. J. Law, 467 [private way]). *s. p.*, *Knight v. Abert*, 6 Pa. St. 472; *Roulston v. Clark*, 3 E. D. Smith, 366; *Pierce v. Whitcomb*, 48 Vt. 127; *Reardon v. Thompson*, 149 Mass. 267; 21 N. E. 369; *Stevens v. Nichols*, 155 Mass. 472; 29 N. E. 1150; *Metcalf v. Cunard S. S. Co.*, 147 Mass. 66; 16 N. E. 701 [plaintiff wishing to see a doctor supposed to be on shipboard, went by freight gangway]; *Faris v. Hoberg*, 134 Ind. 269; 33 N. E. 1028 [elevator shaft in unfrequented part of store]; *Elliott v. Carlson*, 54 Ill. App. 470 [same: stairway]; *Eisenberg v. Missouri Pac. R. Co.*, 33 Mo. App. 85; *Galveston Oil Co. v. Morton*, 70 Tex. 400; 7 S. W. 756. Plaintiff's horse fell into his neighbor's well, there being an agreement that each could pasture upon the other's land. Held, he could not recover (*McGill v. Compton*, 66 Ill. 327). Several pupils, on defendant's compliance with their teacher's request to do so, visited defendant's power house,

and while inspecting the machinery, one of them stepped into an unprotected vat of hot water which he was unable to see. Held, defendant not liable for failure either to warn him of the danger, or to protect the vat by a railing, or to sufficiently light the building to enable him to see it (*Benson v. Baltimore Traction Co.*, 77 Md. 535; 26 Atl. 973). *s. p.*, *Larmore v. Crown Point Co.*, 101 N. Y. 391; 4 N. E. 752 [dangerous machinery].

³ *Corby v. Hill*, 4 C. B. N. S. 556; *Sweeney v. Old Colony, etc. R. Co.*, 10 Allen, 368; *Toomey v. Sanborn*, 146 Mass. 28; 14 N. E. 921. In *Beck v. Carter* (68 N. Y. 283), the owner of a lot who allowed the public to use it as a thoroughfare, for many years, was held to have given more than a bare license to use it, and liable for not guarding an excavation which he opened therein. Defendant permitted the public to use his private bridge, which seemed in good condition, but which he knew was unsafe [rotten timbers under sound planking]. Plaintiff broke through, and recovered damages (*Campbell v. Boyd*, 88 N. C. 129). Where the public has been accustomed to travel a well-defined road across one's land, though no right of way by user has been acquired, he is liable for injuries caused by stretching a barbed-wire, not visible after dark, across such way, without anything to warn travelers of its existence (*Morrow v. Sweeney*, 10 Ind. App.

of a defect in the land, caused by strangers, without the knowledge or consent of the owner.⁴ And still less can a trespasser complain of defects in a structure, caused by mere neglect.⁵ The owner of land, where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition,⁶ for they, being

626; 38 N. E. 187; *Carskaddon v. Mills*, 5 Ind. App. 22; 31 N. E. 559). Defendant undertook to stop travel across a bridge, which travel he had permitted by license, and removed a plank from the end of the bridge. Having given no warning of danger, held liable for injuries received (*Wheeler v. St. Joseph Stock-Yards Co.*, 2 Mo. App. Rep'r, 1309).

⁴ *Illinois Central R. Co. v. Carraher*, 47 Ill. 333; see also *Wolf v. Kilpatrick*, 101 N. Y. 146; 4 N. E. 188. Where defendant's wall fell and injured plaintiff, because a stranger had removed an adjoining wall without notice to him, he was held not to be liable (*Mahoney v. Libbey*, 123 Mass. 20; citing *Nichols v. Marsland*, L. R. 10 Ex. 255; and *Gray v. Harris*, 107 Mass. 492). Where plaintiff was injured by the fall of a bust from a balcony in a hall hired for a concert by defendant, he could not recover because he did not show whether the audience did or did not rightfully have access to the balcony, "and thus whether the fall may not have been occasioned by the wrongful or negligent act of some third person" (*Kendall v. Boston*, 118 Mass. 234). S. P., *Barton v. Pepin county Agricul. Soc.*, 83 Wisc. 19; 52 N. W. 1129.

* A trespasser entered defendant's abandoned freight-house and the wind blew the wall down upon him. Held, he could not recover (*Lary v. Cleveland, etc. R. Co.*, 78 Ind. 323; *Union Stock-Yards, etc. Co. v. Rourke*, 10 Ill. App. 474). S. P.,

Dicken v. Liverpool Salt, etc. Co., 41 W. Va. 511; 23 S. E. 582 [walking on track of private tramway]; *Mergenthaler v. Kirby*, 79 Md. 182; 28 Atl. 1065 [thief]. A teamster who, after delivering goods at the back door of a store, as directed by the proprietor, starts through the rear part of the store for a receipt, and falls through an open trapdoor, is not necessarily a trespasser, so as to prevent a recovery for the injuries received (*Pelton v. Schmidt*, 104 Mich. 345; 62 N. W. 552). A general allegation that plaintiff was lawfully on the premises is sufficient to show that he was not a trespasser, but will not show that he was there with greater right than that of a mere licensee (*Matthews v. Consee*, 51 N. J. Law, 30; 16 Atl. 195).

⁶ Leaving unguarded a burning slack pit of a coal mine, close to a narrow path leading to the mine, near which children are in the habit of playing, the fire being concealed by ashes, is negligence, which renders the operator of the mine liable for injuries caused to a child by falling into the pit, without knowledge of the danger or negligence on his part (*Union Pac. R. Co. v. McDonald*, 152 U. S. 262; 14 S. Ct. 619; aff'g 42 Fed. 579). Defendant held liable for stacking a lot of lumber on his unfenced lot so badly that it fell upon a child playing there (*Branson v. Labrot*, 81 Ky. 638). See also *Delaney v. Rochereau*, 34 La. Ann. 1123; *Mackey v. Vicksburg*, 64 Miss. 777. Defendant's stock-yards

without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees.⁷ And yet merely allowing children to play upon a vacant lot is held not to amount to an invitation which creates liability for its condition.⁸ A person who goes upon the land of another to seek employment from him, is a mere licensee, to whom the owner does not owe that duty of reasonable care which he owes to a servant. And such duty begins, not with the engagement to work, but with the work.⁹ An officer of the law who enters upon premises in the

on the outskirts of a town were fully inclosed, and had secure gates through which to enter, but on the inside there was a gate in a dangerous condition. Held, proprietor was not liable for the death of a child caused by the falling of such defective inside gate while the child was swinging on it, though the company knew that children played in the vicinity of the yards, if the child entered the yards, without the knowledge of the company, by climbing over an outside gate (Chicago, etc. R. Co. v. Bockoven, 53 Kans. 279; 36 Pac. 322).

¹ *Pekin v. McMahon*, 154 Ill. 141; 39 N. E. 484; *Earl v. Crouch*, 61 Hun, 624; 16 N. Y. Supp. 770; *aff'd* 131 N. Y. 613. The rule of the text was applied where a child was hurt by a dangerous gate on defendant's land (*Birge v. Gardner*, 19 Conn. 507); and by an unlatched turn-table near two traveled roads (Sioux City, etc. R. Co. v. Stout, 17 Wall. 657); and by an unguarded elevator in a coal yard near the sidewalk (*Mullaney v. Spence*, 15 Abb. N. S. 318); and by a hinged platform, in an open alley, that would fall from a touch (*Hydraulic Works Co. v. Orr*, 83 Pa. St. 332). See also *Keffe v. Milwaukee, etc. R. Co.*, 21 Minn. 207; *Brinkley M'f'g Co. v. Cooper*, 60 Ark. 545; 31 S. W. 154. See, as to protecting railroad turn-tables from med-

dling children, cases cited in notes 8-10, § 73, and in note 6, § 410, *ante*; also *Walsh v. Fitchburg*, 67 Hun, 604; 22 N. Y. Supp. 441; s. c., 73 Hun, 1; 28 N. Y. Supp. 1097. As to fencing machinery, see §§ 683, 685, *ante*; and *Schmidt v. Cook*, 4 N. Y. Misc. 85; 23 N. Y. Supp. 799.

⁸ *Galligan v. Metacomet Mfg. Co.*, 143 Mass. 527; 10 N. E. 171; *Clark v. Manchester*, 62 N. H. 577; *Hargreaves v. Deacon*, 25 Mich. 1; *Breckenridge v. Bennett* [Pa. Com. Pl.], 7 Kulp, 95; *Newdall v. Young*, 8 Hun, 361; 30 N. Y. Supp. 84; *Greene v. Linton*, 7 N. Y. Misc. 272; 27 N. Y. Supp. 891; *Ratte v. Dawson*, 50 Minn. 450; 52 N. W. 965; *Spokane, etc. R. Co. v. Holt*, [Idaho], 40 Pac. 56; *Moran v. Pullman Car Co.*, 134 Mo. 641; 36 S. W. 659 [unfenced pond]. See *Barney v. Hannibal, etc. R. Co.*, 126 Mo. 372; 28 S. W. 1069. The owner of an unfenced lot, on which there was a pond of water, held not liable for the death of a boy accustomed to play by the pond, who fell from a raft constructed by himself (*Richards v. Connell*, 45 Neb. 467; 63 N. W. 915).

⁹ *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; 4 N. E. 752. The court distinguished this case from one where the person injured is an employee of the owner (*Fuller v. Jewett*, 80 N. Y. 46), or where the injury is caused by some dangerous

performances of his duty, is not a mere licensee, and may maintain an action for their defective condition.¹⁰ But a fireman, not being such an officer, and entering not as of right or by invitation, is a licensee only.¹¹ And so is a constable, entering to serve a civil writ.¹²

§ 706. **Owner's liability to his invited guest.** — The precise ground and degree of liability of a land-owner to an invited guest, having no business relations with him, are not yet thoroughly settled.¹ In our judgment, the same rule should

thing placed by the owner upon the premises, without giving warning thereof (*Bird v. Holbrook*, 4 Bing. 628), or where the owner, in the prosecution of his own purpose or business, invites another, either expressly or impliedly, to come upon his land, who is injured by unreasonable or concealed dangers, or where a licensee is injured by some affirmative negligence (*Corby v. Hill*, 4 C. B. N. S. 556; *Smith v. London, etc. Docks Co.*, L. R. 3 C. P. 326; *Holmes v. North Eastern R. Co.*, L. R. 6 Exch. 123; *Barry v. N. Y. Central R. Co.*, 92 N. Y. 289; *Beck v. Carter*, 68 Id. 283). And see *Severy v. Nickerson*, 120 Mass. 306; *Plummer v. Dill*, 156 Id. 426; 31 N. E. 128; *Hounsell v. Smyth*, 7 C. B. N. S. 731. Compare *White v. France* (L. R. 2 C. P. Div. 308), where it was held that an action could be maintained by a licensed waterman who was injured on defendant's wharf, where he had gone to complain of the improper navigation of defendant's barge, and upon the invitation of his servant, and at the same time to seek employment in the navigation of the barge. A girl of fifteen, who had been at work on defendant's premises, engaged in play with others and fell into an unguarded elevator in an adjoining passage. The defendant was held liable (*Atlantic Factory Co. v. Speer*, 69 Ga. 137).

¹⁰ *Learoyd v. Godfrey*, 138 Mass. 315; *Parker v. Barnard*, 135 Id. 116. But inasmuch as the owner of a lot fronting on a street cut down by the city, thirty-eight feet below the grade of the lot is not bound to guard the edge of his lot, he is not answerable for the death of a police officer who, coming upon the lot in pursuit of an offender, falls therefrom into the street (*Woods v. Lloyd* [Pa.], 16 Atl. 43).

¹¹ *Beehler v. Daniels*, 18 R. I. 563; 29 Atl. 6; *Woodruff v. Bowen*, 136 Ind. 431; 34 N. E. 1113; *Gibson v. Leonard*, 143 Ill. 182; 32 N. E. 182.

¹² *Blatt v. McBarron*, 161 Mass. 21; 36 N. E. 468.

¹ In *Southcote v. Stanley* (1 Hurlst. & N. 247), *Pollock, C. B.*, with whom it was a favorite notion that all members of a family were subject to the rule which restricts the right of a servant to recover from his master for injuries caused by negligence (see *Abraham v. Reynolds*, 5 Hurlst. & N. 143), held that a guest also fell within this rule, and could not recover from his host for an injury caused by a defect in the construction of the house, although owing to the negligence of the host. Baron Alderson concurred in this view. Baron Bramwell held that the host was liable for any misfeasance, but not for mere nonfeasance. But we are not satisfied with either theory.

be applied in such a case that would be applied if the property were personal instead of real. The host should always be held responsible to the guest for gross negligence,² that is, for such want of care as would justify a suspicion that he was indifferent to the safety of his guest; and if, for his own benefit or for purposes of mutual benefit, he invites another upon his premises, he should be held liable for any want of ordinary care in respect to the condition of the property.³

No attempt was made to sustain either by any process of reasoning; and we cannot see how any satisfactory reasons could be assigned. To the contrary, see *Sweeney v. Old Colony, etc. R. Co.*, 10 Allen, 368. See limitations of the former case in *Tebbutt v. Bristol, etc. R. Co.*, L. R. 6 Q. B. 73.

² This is familiar law with regard to persons riding over railroads without paying fare (*Phila. & Reading R. Co. v. Derby*, 14 How. U. S. 468; *Nolton v. Western R. Co.*, 15 N. Y. 444; *Bissell v. Michigan Southern, etc. R. Co.*, 22 N. Y. 258, 308). In *Baker v. Tibbetts* (162 Mass. 468; 39 N. E. 350), defendant invited plaintiff to enter his premises, without warning him of the presence of a pit containing sulphide of carbon. Held, liable.

³ One entering premises of right or by invitation, and using a path which for many years has been used with the acquiescence of the owner, is not precluded from recovering for an injury caused by a hole dug by the owner in the path, merely because the owner has provided another way that was safe, and might have been used. It is a question for the jury whether the path taken by plaintiff has by use known to defendant gained the appearance of a way that persons were invited to use (*Phillips v. Library Co.*, 55 N. J. Law, 307; 27 Atl. 478). s. p., *Lep-*

nick v. Gaddis, 72 Miss. 200; 16 So. 213. In *Davis v. Central Congregational Soc.* (129 Mass. 367), a religious society gave notice of a meeting at its house of worship and invited members of other societies to attend; held, that a member, so invited, while on the land of the society, was not a mere licensee, and might recover for an injury sustained from the dangerous condition of the premises. s. p., *Howe v. Ohmart*, 7 Ind. App. 32; 33 N. E. 466 [former student of college, attending meeting of literary society, in college building, on students' circular invitation, sent out by authority of college]. In *Atlanta Oil Mills v. Coffey* (80 Ga. 145; 4 S. E. 759), the manager of a charitable institution had defendant's permission to take away refuse from its mill. Held, his employee engaged in carting it off was not a mere licensee on defendant's premises, and could recover for injuries from defects therein. An agricultural society is liable to a person lawfully in attendance on their public exhibition, for injuries caused by their grounds not being reasonably safe (*Selinas v. Vermont Agr. Soc.*, 60 Vt. 249; 15 Atl. 117; *Dunn v. Brown Co. Agr. Soc.*, 46 Ohio St. 93; 18 N. E. 496 [defective seats]; *Fox v. Buffalo Park*, 21 N. Y. App. Div. 321; 41 N. Supp. 788 [same]).

§ 707. Unusual or improper use of land or building. —

The owner or occupant of real property is not bound to make it safe for a purpose which is unlawful or improper, or for which he could not reasonably anticipate that it would be used, or in a mode for which it was obviously never designed, even though such use was intended for his benefit.¹ And a mere license by the landlord to tenants to use the premises in a special manner (*e. g.*, the roof for drying linen), does not bind him to keep it safe for that purpose,² unless such use is essential to the enjoyment of the premises.³

§ 708. Landlord's liability for defects arising after lease. —

An owner of property, either real or personal, who lets or lends it, without agreeing to make repairs thereon, and who transfers the entire possession and control of the property to the hirer, is not responsible for defects subsequently arising therein,¹

¹ *Fanjoy v. Seales*, 29 Cal. 243 [house painter fastened staging to cornice, which gave way under the strain]. *s. p.*, *Chapin v. Walsh*, 37 Ill. App. 526. A. took a heavy stone upon a balcony which broke down under the weight. Held, a verdict in his favor was erroneous (*Mullen v. Rainear*, 45 N. J. Law, 520). Where a tenant used a fire-escape for a balcony, and in consequence of overweighting, it fell; landlord held not responsible, even though it might have been out of repair (*McAlpin v. Powell*, 70 N. Y. 126; *rev'g* 1 Abb. N. C. 427). See cases cited in note 1, § 702, and in note 1, § 705, *ante*.

² *Ivay v. Hedges*, L. R. 9 Q. B. Div. 80.

³ Where the roof of a tenement house is designed for the common use of tenants in hanging out clothes to dry, the landlord may be liable for defects therein (*Alperin v. Earle*, 55 Hun, 211; 8 N. Y. Supp. 51; see § 708, *post*). If the occupants of a tenement house are permitted, without objection, to use the yard, and

there is no restriction in the lease against such use, an easement is thereby created in favor of the tenant, and the landlord is liable for injuries resulting from his failure to make the yard safe (*Canavan v. Stuyvesant*, 7 N. Y. Misc. 113; 27 N. Y. Supp. 413).

¹ *Clancy v. Byrne*, 56 N. Y. 129; *Swords v. Edgar*, 59 Id. 28; *Ditchett v. Spuyten Duyvil, etc. R. Co.*, 67 Id. 425; *Ryan v. Wilson*, 87 Id. 471; *Wolf v. Kilpatrick*, 101 Id. 146; 4 N. E. 188; *Ahern v. Steele*, 115 N. Y. 203; 22 N. E. 193; *Taylor v. New York*, 4 E. D. Smith, 559; *New York v. Corlies*, 2 Sandf. 301; *Blunt v. Aiken*, 15 Wend. 522; *O'Brien v. Greenbaum*, 52 Hun, 610; 4 N. Y. Supp. 852; *Babbage v. Powers*, 54 Hun, 635; 7 N. Y. Supp. 306; *McLean v. Fiske Wharf, etc. Co.*, 158 Mass. 472; 33 N. E. 499; *Szathmary v. Adams*, 166 Mass. 145; 44 N. E. 124; *Gwathney v. Little Miami R. Co.*, 12 Ohio St. 92 [railroad bridge]; *Johnson v. McMillan*, 69 Mich. 36; 36 N. W. 803; *Ward v. Fagin*, 101 Mo. 669; 14 S. W. 738; *Kalis v. Shat-*

either to the tenant² or to third persons,³ even though the premises be in such a condition that they will naturally become a nuisance if the tenant fails to repair as he has covenanted.⁴ A tenant subletting has no greater liability than the original landlord.⁵ A landlord is, however, liable for negligence in any repairs which he undertakes, though he be not bound to make them.⁶ If the owner covenants with the lessee to repair, he is

tuck, 69 Cal. 593; 11 Pac. 346; *Johnson v. Tacoma Lumber Co.*, 3 Wash. St. 722; 29 Pac. 451; *Kahn v. Love*, 3 Oreg. 206. In *Cheetham v. Hampson* (4 T. R. 318), held that landlord was not liable to a stranger for the non-repair of fences. S. P., as to repairing leased bridge, *Reg. v. Bucknall*, 2 Ld. Raym. 804. See *Bishop v. Bedford Charity*, 1 El. & E. 697. Where the roof-water was collected by gutters into a box, and a rat made a hole therein, the landlord held not liable to tenant on the ground floor (*Carstairs v. Taylor*, L. R. 6 Ex. 217).

² *Platt v. Farney*, 16 Ill. App. 216; *Bowe v. Hunking*, 135 Mass. 380; *Scott v. Simons*, 54 N. H. 426; *Humphrey v. Wait*, 22 Up. Can. [C. P.] 580; *Town v. Armstrong*, 75 Mich. 580; 42 N. W. 983. The owner is not liable to a sub-tenant for injury to his goods, caused by a falling wall, where the sub-tenancy is without the owner's consent; and consent cannot be presumed in the absence of evidence that the owner knew of the sub-tenancy (*Donaldson v. Wilson*, 60 Mich. 86; 26 N. W. 842).

³ *Ryan v. Wilson*, 87 N. Y. 471; *Deutsch v. Abeles*, 15 Mo. App. 398; *Shindelbeck v. Moon*, 32 Ohio St. 264. See *Wilson v. Treadwell*, 81 Cal. 58; 22 Pac. 304 [action under statute].

⁴ *Leonard v. Storer*, 115 Mass. 86 [house so constructed that snow and ice will naturally fall from it upon

street]. Where landlord does not covenant to repair, although reserving the right to enter for that purpose, he is not liable for injuries caused by the fall of snow into the adjoining highway from the roof, it not appearing that the tenant might not have cleared the roof by the exercise of due care, or that he could not by proper precaution have prevented the accident (*Clifford v. Atlantic Cotton Mills*, 146 Mass. 47; 15 N. E. 84). The occupant, not the landlord, is liable for injuries received on account of the improper condition of the covering to an excavation extending under the sidewalk, and forming a part of the basement, where the covering was properly constructed; nor is this varied by a provision in the lease that the lessee shall not be bound to repair the roof, and that the lessors may enter to make repairs (*Boston v. Gray*, 144 Mass. 531).

⁵ A lessee of a pier, who had covenanted to make ordinary repairs, and sublet it in a state of repair, held not liable to a drayman whose horse was killed by falling through a rotten plank (*Clancy v. Byrne*, 56 N. Y. 129). See also *Jaffe v. Harteau*, 56 N. Y. 398; *O'Brien v. Capwell*, 59 Barb. 497; *Cleves v. Willoughby*, 7 Hill, 83; *Lucas v. Coulter*, 104 Ind. 81; *Fisher v. Thirkell*, 21 Mich. 1; *Hale v. Dutant*, 39 Tex. 667.

⁶ A landlord who, at the solicitation of his tenant, gratuitously undertakes to repair the premises leased, but does

liable to third persons⁷ and to the tenant, for the want of repair, notwithstanding he has given up the entire possession of the property, provided he had notice, express or implied, of its dangerous condition.⁸ Ordinarily the owner is not liable for any wrongful use or mismanagement of the property by the hirer;⁹ for the latter is not his agent.¹⁰ If there was only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy, after the tenant had erected a nuisance, that would make the landlord liable.¹¹

it so unskillfully as to subsequently cause an injury thereby to the tenant, is liable therefor (Gregor v. Cady, 82 Me. 131; 19 Atl. 108). s. p., Gill v. Middleton, 105 Mass. 477; Riley v. Lissner, 160 Mass. 330; 35 N. E. 1130; O'Dwyer v. O'Brien, 13 N. Y. App. Div. 570; 43 N. Y. Supp. 815; Little v. McAdaras, 38 Mo. App. 187. Owner liable for fall of awning, erected by lessee, with consent of owner who furnished part of the material, fall being due to insufficient wall (Riley v. Simpson, 83 Cal. 217; 23 Pac. 293).

⁷ Benson v. Suarez, 43 Barb. 408; Henkel v. Murr, 31 Hun, 28; Payne v. Rogers, 2 H. Blackst. 350; Todd v. Flight, 9 C. B. N. S. 377.

⁸ Unless the owner knows the premises to be unsafe to use, or from the facts and circumstances, in the exercise of ordinary care and prudence, he should have known of their dangerous condition, he is not liable as for a tort (Spellman v. Bannigan, 36 Hun, 174; Sieber v. Blanc, 76 Cal. 173; 18 Pac. 260; Tuttle v. Gilbert Mfg. Co., 145 Mass. 169; 13 N. E. 465; Hutchinson v. Cummings, 156 Mass. 329; 31 N. E. 127; Borman v. Sangren, 37 Ill. App. 160). See Black v. Maitland, 11 N. Y. App. Div. 188; 42 N. Y. Supp. 653. A charge that if the premises were out of repair and insecure, the plaintiff had made out a *prima facie* right to recover, held, error, as the landlord

was only bound to use reasonable diligence in finding out what repairs were necessary, and in making such repairs as due inspection would show to be proper (Frank v. Conradi, 50 N. J. Law, 23; 11 Atl. 480).

⁹ Sargent v. Stark, 12 N. H. 332; Fisk v. Framingham Mfg. Co., 14 Pick. 491. Thus, where a ferry was leased for a definite period to a person who assumed its entire control, held that the lessor was not responsible to passengers for injuries caused by the negligence of the lessee's servants (Norton v. Wiswall, 26 Barb. 618). The lessor of a mill with water-power is not liable for the act of a lessee in excavating the bed of the river so as to damage a neighboring mill-owner (Stickney v. Munroe, 44 Me. 195). See § 722, *post*.

¹⁰ White v. Montgomery, 58 Ga. 204.

¹¹ Rex v. Pedley, 1 Ad. & El. 822. Where a landlord leases a portion of his premises to a tenant, who covenants to repair, and a nuisance is created by his failure to repair, the landlord cannot relieve himself from liability for the injury caused to his other tenants of the same premises, by renewing the lease, without entering into actual possession, at the expiration of the term, although the new lease also contains a covenant by the tenant to repair (Ingwersen v. Rankin, 47 N. J. Law, 18; *aff'd*, *sub nom.* Rankin v. Ingwersen, 49

§ 709. Liability to tenant for defects at date of lease. —

On the owner's entire surrender of control over premises to a lessee, he is, in the absence of any warranty of their condition or fraudulent concealment of known defects or agreement to repair, on his part, free from liability to the lessee and to those whom the latter invites upon the premises,¹ for defects which could have been discovered by the lessee, on reasonable inspection, at the time of hiring.² In other words, if the lessee has the same opportunities as the owner to discover a defect, at the time of leasing, the rule of *caveat emptor* applies, and he takes the premises as he finds them. There is, therefore, no implied warranty on the part of a lessor that the demised premises are safe or reasonably fit for occupation.³

N. J. L. 481; 10 Atl. 545). S. P., Matthews v. De Groof, 13 N. Y. App. Div. 356; 43 N. Y. Supp. 237.

¹ Robbins v. Jones, 15 C. B. N. S. 221, 240. "The tenant takes an estate in the premises hired, and persons who occupy by his permission, or as members of his family, cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant being in possession, determines who shall occupy or enter his premises" (per Field, J., *Bowe v. Hunking*, 135 Mass. 380). S. P., Mellen v. Morrill, 126 Mass. 545 [tenant's customer]; Akerly v. White, 58 Hun, 362; 12 N. Y. Supp. 149 [member of tenant's family]; Donner v. Ogilvie, 49 Hun, 229; 1 N. Y. Supp. 633 [tenant's child]; Moore v. Logan Iron, etc. Co. [Pa.], 7 Atl. 198 [tenant's guest]; State v. Boyce, 73 Md. 469; 21 Atl. 322 [lessee's servant]; see Henkel v. Murr, 31 Hun, 28; Burdick v. Cheadle, 26 Ohio St. 393; Marshall v. Heard, 59 Tex. 266; Pleon v. Staff, 9 Mo. App. 309; Cruselle v. Pugh, 67 Ga. 430.

² Booth v. Merriam, 155 Mass. 521; 30 N. E. 85 [tenant's action]; Heath

v. Met. Exhibition Co., 58 Hun, 604; 11 N. Y. Supp. 357 [club-house visitor]; Fellows v. Gilhuber, 82 Wisc. 639; 52 N. W. 307 [hotel guest]; Holton v. Waller, 95 Iowa, 545; 64 N. W. 633 [member of lessee's opera troupe]; Eyre v. Jordan, 111 Mo. 424; 19 S. W. 1095 [tenant's visitor].

³ "A landlord who lets a house in a dangerous condition is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is on his contract, if any" (Robbins v. Jones, 15 C. B. N. S. 221). S. P., Keates v. Cadogan, 10 C. B. 591. The rule was modified by act of Parliament in England in 1885 (48 and 49 Vict. c. 72; see Walker v. Hobbs, L. R., 23 Q. B. D. 458). The text sustained: McKenzie v. Cheetham, 83 Me. 543; 22 Atl. 469 [excellent statement of rule, and cases reviewed]; Woods v. Naumkeag, 134 Mass. 357; *Bowe v. Hunking*, 135 Id. 383; Tuttle v. Gilbert Mfg. Co., 145 Id. 169, 175; 13 N. E. 465; Jaffe v. Harteau, 56 N. Y. 393; Akerley v. White, 58 Hun, 362; 12 N. Y. Supp. 149; Sheridan v. Krupp, 141 Pa. St. 564; 21 Atl. 670; Hamilton v. Feary,

Where, however, there is some latent defect, *e, g.*, an original structural weakness⁴ or decay,⁵ or the presence of an infectious disease,⁶ or other injurious thing⁷ rendering the occupation of the premises dangerous, which were known to the lessor, and were not known to the lessee, nor discoverable by him on a reasonable inspection, then it was the duty of the lessor to disclose the defect; and if an injury results therefrom, he is liable as for negligence.⁸

8 Ind. App. 615; 35 N. E. 48; Little v. Macadaras, 29 Mo. App. 332; Perez v. Raybaud, 76 Tex. 191; 13 S. W. 177 [lessee's servant]; Kalis v. Shattuck, 69 Cal. 593; 11 Pac. 346; Daley v. Quick, 99 Cal. 179; 33 Pac. 859. In Doyle v. Union Pac. R. Co. (147 U. S. 413; 13 S. Ct. 333), defendant let a house situated upon a mountain side where snowlides sometimes occurred. Held, not bound to notify the lessee of the danger therefrom, although the lessor had knowledge thereof, and the lessee had not, and had never before lived in a region where snowlides occur; and in the absence of any deceit or misrepresentation the lessor was not liable for personal injuries to the lessee, or for the death of members of latter's family, occasioned by the destruction of the house by a snowslide. In Edwards v. N. Y. & Harlem R. Co. (98 N. Y. 245), defendant leased to K. a building for a walking match, having a gallery built by an architect to accommodate a limited number of people, and for that purpose was safe, but for the use to which it was put on this occasion it was not suitable. Becoming crowded, it fell and injured plaintiff. Held, that, in the absence of evidence tending to show that defendant knew that there was some defect in the gallery, or that it would be used in a way to endanger its safety, a nonsuit was proper.

Landlord not liable for carelessness of upper tenant causing overflow on lower tenant, whether the result was occasioned by faulty construction of water pipes or not (White v. Montgomery, 58 Ga. 204). See also Kaiser v. Hirth, 36 N. Y. Superior, 344; Simons v. Seward, 54 Id. 406; Bernhard v. Reeves, 6 Wash. St. 424; 33 Pac. 873.

⁴Timlin v. Standard Oil Co., 126 N. Y. 514; 27 N. E. 736 [wall out of plumb, and dangerous]; Warren v. Kauffman, 2 Phila. 259 [no waste pipe provided]; Worthington v. Parker, 11 Daly, 545 [defective plumbing]; Dehority v. Whitcomb, 13 Ind. App. 558; 41 N. E. 1059; [weight of slate roof caused house to fall].

⁵Todd v. Flight, 9 C. B. N. S. 377 [dilapidated chimney].

⁶Cesar v. Karutz, 60 N. Y. 229.

⁷Maywood v. Logan, 78 Mich. 135; 43 N. W. 1052 [carcass of dead dog in well]; Wallace v. Lent, 1 Daly, 481 [deleterious stench].

⁸Cowen v. Sunderland, 145 Mass. 363; 14 N. E. 117 [concealed cesspool]; Bowe v. Hunking, 135 Mass. 380; Minor v. Sharon, 112 Id. 477; Stratton v. Staples, 59 Me. 94; Scott v. Simons, 54 N. H. 426, 431; Camp v. Wood, 70 N. Y. 92; Hungerford v. Bent, 55 Hun. 3; 8 N. Y. Supp. 614; Godley v. Hagerty, 20 Pa. St. 387; O'Connor v. Andrews, 81 Tex. 28; 16 S. W. 628; and cases *supra*.

§ 709a. Liability to strangers for defects at date of lease.

— Even the owner's entire surrender of control to a lessee will not relieve him from liability to *third persons* for the premises being, at the time of such surrender, in a condition dangerous to the public, or with a nuisance upon them; for by the act of letting, he, in law, authorizes the continuance of the nuisance,¹ and is, therefore, liable to strangers for injuries suffered therefrom.² And the fact that his lessee covenants to repair furnishes him no protection; for the mere relation of lessor and lessee has no quality which enables the lessor to evade responsibility for his own acts by referring persons injured thereby to a third party for relief. It would obviously be no excuse for the want of necessary repairs, whereby an innocent person had been injured, to show that a contract had been made with a carpenter to execute the needful repairs; and the principle applies with equal force to a contract made with a lessee.³ The burden of proof is, however, upon the plaintiff to show

¹ This is the only ground of liability. The lessor's covenant to repair does not enure to the benefit of a stranger, and its breach will not sustain an action by him (*Sterger v. Van Sicklen*, 132 N. Y. 499; 30 N. E. 987). See note 3, § 712, *post*. "The reason of the rule, that if a landlord lets premises in a condition which is dangerous to the public, or with a nuisance upon them, he is liable to strangers for injuries suffered therefrom, is that by the letting he has authorized the continuance of the nuisance" (*Dalay v. Savage*, 145 Mass. 40; 12 N. E. 841).

² *McGuire v. Spence*, 91 N. Y. 303 [unguarded area]; *Davenport v. Ruckman*, 37 N. Y. 568 [unguarded excavation in sidewalk]; *Irvine v. Wood*, 51 Id. 224 [coal hole]; *Thomas v. Henges*, 131 N. Y. 453; 30 N. E. 238 [defective derrick on dock]; *Fish v. Dodge*, 4 Denio, 311; *Whalen v. Gloucester*, 6 Thomp. & C. 135 [sidewalk]; *McGrath v. Walker*, 64 Hun, 179; 18 N. Y. Supp. 915; *Hungerford v. Bent*, 55 Hun, 3; 8 N. Y.

Supp. 614 [hoisting apparatus]; *Larue v. Farren Hotel Co.*, 116 Mass. 67 [same]; *House v. Metcalf*, 27 Conn. 631 [mill wheel frightening horses]; *Tomle v. Hampton*, 129 Ill. 379; 21 N. E. 800 [depression in sidewalk]; *Chicago v. O'Brennan*, 65 Ill. 160; *Peoria v. Simpson*, 110 Id. 294; *Denver v. Solomon*, 2 Colo. App. 534; 31 Pac. 507; *Dorman v. Ames*, 12 Minn. 451; *Calder v. Smalley*, 66 Iowa, 219; 23 N. W. 638. See other cases cited under § 120, *ante*.

³ The owners of a defective pier, who let it and parted with its control, held liable to a stevedore who was properly using it and was injured by its failing, though the lessees had covenanted to keep it in repair (*Swords v. Edgar*, 59 N. Y. 28). s. p., *Poor v. Sears*, 154 Mass. 539; 28 N. E. 1046 [tenant's employee]. See *Smith v. Buttner*, 90 Cal. 95; 27 Pac. 29. See § 14, *ante*. To the contrary, *Pretty v. Bickmore*, L. R., 8 C. P. 401; *Gwinnell v. Eamer*, 10 Id. 658.

that the defect existed at the time of the lease.⁴ If the owner lets the premises with a nuisance upon them, and the tenant occupying the premises allows the nuisance to remain, they are jointly as well as severally liable for injuries occasioned thereby.⁵ One, however, who acquires title to the premises, pending the term of an outstanding lease, is not bound to detect and abate whatever nuisances may be on the land, and hence is not liable for their continuance until a reasonable time after notice.⁶

§ 710. Liability of partial lessor.—A mere lease of profits arising out of property does not relieve the owner from liability for its non-repair. Nothing, it would seem, short of a surrender of possession can have that effect, even though the lessee covenants to repair.¹ Where only a portion of a building is let, the owner continues responsible for the condition of the remainder, both as to his tenants² and the pub-

⁴ *Union Brass Mfg. Co. v. Lindsay*, 10 Ill. App. 583.

⁵ *Joyce v. Martin*, 15 R. I. 558; 10 Atl. 620; and cases cited in note 8, § 120, *ante*.

⁶ *Penruddock's Case*, 5 Co. 100b. [leading case]; *Winsmore v. Greenbank*, Willes, 583; *Phil. & Reading R. Co. v. Smith*, 64 Fed. 679; 12 C. C. A. 384; *Pillsbury v. Moore*, 44 Me. 154; *Nichols v. Boston*, 98 Mass. 39; *Woodman v. Tufts*, 9 N. H. 88; *Johnson v. Lewis*, 13 Conn. 304; *Ahern v. Steele*, 115 N. Y. 203; 22 N. E. 193 [devisee of premises]; *Brown v. Cayuga R. Co.*, 12 N. Y. 486; *Conhocton Road v. Buffalo*, etc. R. Co., 51 Id. 573; *Miller v. Church*, 5 Hun, 342; *Haggerty v. Thomson*, 45 Id. 398; *Woram v. Noble*, 41 Id. 400; *Pierson v. Glean*, 14 N. J. Law, 36; *Ray v. Sellers*, 1 Duv. [Ky.] 254; *West v. Louisville*, etc. R. Co., 8 Bush, 404; *Groff v. Ankenbrandt*, 124 Ill. 51; 15 N. E. 40; *Metzger v. Schultz*, 16 Ind. App. 454; 43 N. E. 886; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396. See

Irwin v. Sprigg, 6 Gilm. 200; followed, *Owings v. Jones*, 9 Md. 118; *Condon v. Sprigg*, 88 Id. 330; 28 Atl. 395. Notice to one of two or more co-tenants in possession is enough to bind all (*McCabe v. O'Connor*, 4 N. Y. App. Div. 354; 38 N. Y. Supp. 572).

¹ *Taylor v. New York*, 4 E. D. Smith, 559. In *Camp v. Wood* (76 N. Y. 92), an inn-keeper, who let a hall in the third story of his house for a dancing entertainment, to which persons were admitted upon payment of a fee to the managers thereof, was held liable to one of such persons, who mistook a door upon an awning for the street door, and fell to the street, on the ground that "by letting the hall for public purposes he held out to the public that the hall was safe, and was bound to exercise care to provide safe arrangements for the entrance and departure of people who came there upon his invitation."

² *Looney v. McLean*, 129 Mass. 33; *Watkins v. Goodall*, 138 Id. 533; *Toole v. Beckett*, 67 Me. 544; *Kirby*

lic.³ And so where a building is let in flats for offices or for habitation—the halls, entries, stairways, roof and yard not being demised to any tenant but used in common by all—the landlord owes a duty to the tenants, and to those entering the premises to visit them, to keep such undemised parts in a reasonably safe state of repair.⁴ The rule only applies to parts used in common by the several tenants, and not to a part, *e. g.*, an alleyway, forming part of a single tenancy.⁵ The landlord of a building so let owes no duty to the several tenants to care for the sidewalk,⁶ or the approaches to the

v. Boylston Market Asso., 14 Gray, 249; *Readman v. Conway*, 126 Mass. 374; *Payne v. Irvin*, 144 Ill. 482; 33 N. E. 756. Compare *Doupe v. Genin*, 45 N. Y. 119 [goods of tenant of part of building injured by neglect to repair part not demised]. S. P., in all cases in note 4.

³ *Readman v. Conway*, 126 Mass. 374. In *Leonard v. Storer* (115 Mass. 86), the contract of the tenant included the roof as well as the interior, and by the exercise of due care he could have cleared the snow from the roof, and therefore the landlord was not liable; but in *Shipley v. Fifty Associates* (101 Mass. 25), the owner was held liable, because he was in control of the roof. See *Hilsenbeck v. Guhring*, 131 N. Y. 674; 30 N. E. 580; *rev'g* 60 Hun, 584; 15 N. Y. Supp. 162. In that case, the principle was sustained, but judgment for plaintiff was reversed for contributory negligence.

⁴ *Miller v. Hancock*, 4 Reports, 478; [1893] 2 Q. B. 177; *Sawyer v. McGillicuddy*, 81 Me. 318; 17 Atl. 124; *Gordon v. Cummings*, 152 Mass. 513; 25 N. E. 978; *Marwedel v. Cook*, 154 Mass. 235; 28 N. E. 140 [unlighted stairway]; *Palmer v. Dearing*, 93 N. Y. 7 [hole in oilcloth on stairway]; *Tousey v. Roberts*, 114 N. Y. 312; 21 N. E. 399 [open door into elevator shaft]; *Peil v. Reinhart*, 127 N. Y. 381; 27 N. E.

1077 [hole in stair carpet]; *Dollard v. Roberts*, 130 N. Y. 269; 29 N. E. 104 [ceiling in hallway]; *Donohue v. Kendall*, 98 N. Y. 635; *aff'g* 50 N. Y. Super. 386; *Alperin v. Earle*, 55 Hun, 211; 8 N. Y. Supp. 51 [roof in common use for drying clothes]; *Montieth v. Finkbeiner*, 66 Hun, 633; 21 N. Y. Supp. 288 [rubber cover on stair]; *Gillvon v. Reilly*, 50 N. J. Law, 26; 11 Atl. 481; *Ward v. Fagan*, 28 Mo. App. 116 [wall fell]; *O'Connor v. Andrews*, 81 Tex. 28; 16 S. W. 628; *Pike v. Brittan*, 71 Cal. 159; 11 Pac. 890 [overflow of a wash-basin, the cock of which was negligently left open by the janitor employed by landlord]. The owner of a tenement house is not liable for injuries to plaintiff, while coming from a wake held in the house, to which she had neither an express invitation nor one by implication as being a relative or friend of deceased (*Hart v. Cole*, 156 Mass. 475; 31 N. E. 644).

⁵ In such case, the landlord owes the tenant no duty to repair (*O'Dwyer v. O'Brien*, 13 N. Y. App. Div. 570; 43 N. Y. Supp. 815).

⁶ The owner owes no duty to remove ice and snow from the sidewalk (*Little v. Wirth*, 6 N. Y. Misc. 301; 26 N. Y. Supp. 1110); but he should remove ice formed in a passageway or court-yard leading from the stoop to the street if it is

building from the street, unless he puts a janitor or other agent in charge, in which case he is liable for that agent's negligence, *e. g.*, in leaving an open and unguarded coal-hole in the sidewalk through which coal was delivered to the tenants.⁷ The mere fact of a defect and of a resulting injury therefrom is not proof of the owner's negligence;⁸ he must be charged with notice of the defect,⁹ actual or imputed;¹⁰ but actual knowledge need not be proved.¹¹ It is not contributory negligence for a tenant to pass along a hallway, with knowledge that the ceiling is in dangerous condition.¹² Otherwise, if he knew its condition when he hired.¹³

§ 711. [consolidated with § 709.]

§ 712. **Tenant, when not liable.** — A tenant of land, like a hirer or borrower of a thing, is not responsible to strangers for defects which existed in it when he took possession of it,¹

rough or uneven and not merely slipperiness (*Harkin v. Crumbie*, 20 N. Y. Misc. 568; 46 N. Y. Supp. 453).

⁷ *Jennings v. Van Schaick*, 108 N. Y. 530; 15 N. E. 424. In that case, held proper to refuse to charge that if the janitor received the coal for a tenant, and not for or in the service of defendant, defendant is not liable. *s. p.*, *Stevenson v. Joy*, 152 Mass. 45; 25 N. E. 78. In *Martin v. Pettit* (117 N. Y. 118; 22 N. E. 566; *rev'd* 49 Hun, 166; 1 N. Y. Supp. 613), owner hired a watchman to patrol street; while latter was at a different part of his round, coal-hole cover was removed without watchman's knowledge or authority. Held, no negligence shown.

⁸ *Schanda v. Sulsberger*, 7 N. Y. App. Div. 221; 40 N. Y. Supp. 116; [mere fact of fall of ceiling not sufficient proof of negligence]. The mere fact that the gas was not lit in a hallway at night is not proof of negligence, so as to render the owner liable to one who falls down the stairs (*Muller v. Minken*, 5 N. Y. Misc. 444; 26 N. Y. Supp. 801).

⁹ *Henkel v. Murr*, 31 Hun, 28; *Lenz v. Aldrich*, 6 N. Y. App. Div. 178; 39 N. Y. Supp. 1022; *Franz v. Mulligan*, 18 N. Y. Misc. 411; 42 N. Y. Supp. 509.

¹⁰ Notice to rent-collector is notice to landlord (*Dollard v. Roberts, supra*). See *Alperin v. Earle*, 55 Hun, 211; 8 N. Y. Supp. 51; *Schmidt v. Cook*, 12 N. Y. Misc. 449; 33 N. Y. Supp. 624.

¹¹ *Leydecker v. Brintnall*, 158 Mass. 292; 33 N. E. 399 [defective approach]; *Lindsey v. Leighton*, 150 Mass. 285; 22 N. E. 901 [same].

¹² *Dollard v. Roberts*, 130 N. Y. 269; 29 N. E. 104.

¹³ *Quinn v. Perham*, 151 Mass. 162; 23 N. E. 735 [hallway]. See § 709, *ante*.

¹ *Eakin v. Brown*, 1 E. D. Smith, 36; *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *McKenna v. Martin, etc. Paper Co.*, 176 Pa. St. 306; 35 Atl. 181 [collapse of warehouse]. The mere fact that a warehouse collapses is not proof that the lessee negligently overloaded it, he having no notice of any defect in it (*Ib.*). A tenant

owner on the stream,¹³ except in case of a flood or sudden emergency.¹⁴

§ 730. **Erection of dams.** — The right of the owner of the bed or of the banks of an unnavigable stream to erect a dam across it cannot be questioned; and so long as he exercises, in its construction and maintenance, an ordinary and reasonable degree of care, he is not liable for the indirect and consequential damages caused by such erections to other mills on the same stream.¹ It is only for such injuries as are palpable, such as render the mill below useless or less productive,² that the law furnishes a remedy. If the only result of erecting a dam in proximity to one already built is that the proprietor of the latter is obliged to extend his dam further into the stream, or to carry produce a greater distance to his mill, these are not injuries for which he can recover, provided he still has

¹³ McKee v. Delaware, etc. Canal Co., 125 N. Y. 353; 26 N. E. 305; aff'g 52 Hun, 52; 4 N. Y. Supp. 753; Tillotson v. Smith, 32 N. H. 90; Baltimore v. Appold, 42 Md. 442; Merritt v. Parker, Coxe, 460; Richardson v. Kier, 37 Cal. 263; see Williams v. Gale, 3 Harr. & J. 231. It is no defense that defendant erected the dam in question to protect his land from an increase in the volume of the water (Bliss v. Johnson, 76 Cal. 597; 16 Pac. 542, 18 Id. 785.)

¹⁴ An extraordinary flood is a common enemy, against which a man has a right to protect his own property, although the damage inflicted by the flood upon a neighbor be thereby increased; provided he does not interfere with the natural outlet of a natural stream (Nield v. London, etc. R. Co., L. R. 10 Ex. 4). See Box v. Jubb, L. R. 4 Ex. Div. 76; Mailhot v. Pugh, 30 La. Ann. 1359; Montgomery v. Locke, 72 Cal. 75; 11 Pac. 874; 13 Id. 401; Velte v. United States, 76 Wisc. 278; 45 N. W. 119.

¹ An instruction that, if the dam broke by reason of an ordinary storm, such as might have been anticipated, plaintiff was entitled to a verdict; but that if it broke by reason of an extraordinary storm, such as could not have been anticipated, it was *damnum absque injuria*, held, proper (Myers v. Fritz, [Pa. Supp.], 10 Atl. 30). See Chandler v. Howland, 7 Gray, 350; Davis v. Winslow, 51 Me. 291; Webb v. Portland Mfg. Co., 3 Sumner, 189; Shrewsbury v. Smith, 12 Cush. 177, 181; Thompson v. Crocker, 9 Pick. 59; Anderson v. Thunder Bay Boom Co., 61 Mich. 489; 28 N. W. 518; Wright v. Shindler, 17 Oreg. 404; 21 Pac. 195.

² Merritt v. Brinkerhoff, 17 Johns. 306; Johnson v. Lewis, 13 Conn. 303; Wadsworth v. Tillotson, 15 Id. 366; Tyler v. Wilkinson, 4 Mason, 401; see Pitts v. Lancaster Mills, 13 Metc. 156; Brace v. Yale, 10 Allen, 444; Wadsworth v. McDougall, 30 Upp. Can. [Q. B.] 369; Mack v. Bensley, 74 Wisc. 112.

already stated,³ the tenant or hirer is liable (to the same extent as if he were the owner⁴) to persons whom he invites to use the property, for injuries suffered by them from defects in it existing when he took possession of it, or at any time afterward, while in his possession.⁵ And any one who by his culpable negligence in excavating land, or otherwise, injures another, is liable for the injury, whether he had any right to the land or not.⁶ A tenant is only liable for causing a permanent injury to the demised premises over and above the ordinary wear and tear, when such injury is caused by his wrongful act or negligence.⁷

§ 714. [consolidated with § 343.]

§ 715. [consolidated with § 703.]

§ 716. **Miner's absolute liability.** — Where mines are dug in land, the whole of which belongs to the miner or his landlord, the ordinary rules concerning excavations, of course, apply; but where, as is often the case, the title to the surface of the land is in one person, and the title to the minerals underneath the surface is in another, together with the right to excavate for and remove them, the case is obviously different. Unless there is some peculiar law or contract affecting the rights of the parties, the miner is in such case absolutely bound to leave sufficient support to the surface to prevent it, while in a natural state, from falling in;¹ and for any injury done to the surface-

the lessee of the land, who was owner of the shed, rather than of the lessor or owner of the land over which such access lies, to maintain a reasonably safe means of access to the shed over the driveway (*Abbott v. Jackson*, 84 Me. 449; 24 Atl. 900).

³ See § 710, *ante*.

⁴ See §§ 702, 705, *ante*.

⁵ See anonymous cases, cited by *Bramwell, B.*, in *Cornman v. Eastern Counties R. Co.*, 4 Hurlst. & N. 781, 785. See, also, *Kaiser v. Hirth*, 36 N. Y. Superior, 344; *Peoria v. Simpson*, 110 Ill. 294; *Pickard v. Smith*, 10 C. B. N. S. 470 [leaving cellar door open without guard in the

path of one lawfully passing]. See § 719, *post*.

⁶ *Bibby v. Carter*, 4 Hurlst. & N. 153; *Rau v. Minn. Valley R. Co.*, 13 Minn. 442; *Crandall v. Loomis*, 56 Vt. 664.

⁷ *Sheer v. Fisher*, 27 Ill. App. 464 [action by landlord against tenant for overloading building]; *Brunswick, etc. Co. v. Rees*, 69 Wisc. 442; 34 N. W. 732 [same]. Trespass is not the remedy in such case (*Carroll v. Rigney*, 15 R. I. 81).

¹ *Haines v. Roberts*, 7 El. & Bl. 325; *Humphries v. Brogden*, 12 Q. B. 739; *Harris v. Ryding*, 5 Mees. & W. 67.

owner by the decadence of the land, in consequence of the mining operations, the miner is responsible, notwithstanding he may have used the utmost care.² It does not appear to have been yet decided whether the surface-owner has a similar right to support for buildings erected by him upon the land; but we think he should have.³

§ 717. Miner's liability for negligence. — A miner is undoubtedly liable for damage done to surface buildings by his negligence. He is negligent if he omits to place guards around a pit or shaft sunk by him,¹ or if he excavates nearer to the surface than experience has shown to be safe, and leaves no support for it, natural or artificial, or if he blasts rock in such manner as unnecessarily to shake buildings on the surface or on adjoining lands, and, generally, if he omits any precaution which is reasonably necessary to prevent injury.² One of two adjoining mine-owners is liable if he conducts water into the other's mines, which would not otherwise go there, or if he causes water to go there at different times and in larger quantities than it would naturally go; and he will be restrained from removing the supports which prevent the surface of his mine from caving in, if such removal would result in the destruction

² *Haines v. Roberts*; *Humphries v. Brogden*, *supra*; *Kistler v. Thompson*, 158 Pa. St. 139; 27 Atl. 874.

³ See *Hilton v. Granville*, 5 Q. B. 701; *Hilton v. Whitehead*, 12 Id. 734. Where the title of both parties was founded upon a statute allowing the miner to excavate to any extent, provided he paid for "all surface damage," held, that damage to a house built on the surface was not included in his liability (*Allaway v. Wagstaff*, 4 Hurlst. & N. 681).

¹ *Union Pac. R. Co. v. McDonald*, 152 U. S. 262; 14 S. Ct. 619 (see note 6, § 705, *ante*).

² Many illustrations of negligence in mining operations, for which the operator becomes liable to his employee engaged therein, are given in chapter x, *ante*. In addition to the cases there cited, consult the

following: *Western Coal, etc. Co. v. Ingraham*, 17 C. C. A. 71; 70 Fed. 219 [duty of mine-owner to make timely inspection of timbers, walls and roof of mine]; *Sangamon Coal Co. v. Wiggerhaus*, 122 Ill. 279; 13 N. E. 648 [failure to keep places of refuge on gangways]; *Coal Run Coal Co. v. Jones*, 127 Ill. 379; 20 N. E. 89 [failure to provide safeguards against coal gas]; *Cunningham v. Union Pac. R. Co.*, 4 Utah, 207; 7 Pac. 795 [falling of coal from roof of mine]; *Cherokee, etc. Coal Co. v. Britton*, 3 Kan. App. 292; 45 Pac. 100 [same]; *Evans v. Chessmond*, 38 Ill. App. 615 [same; contributory negligence]; *Leslie v. Rich Hill Coal Co.*, 110 Mo. 31; 19 S. W. 308 [owner liable to servant of operator for not furnishing timber for propping, under statute].

of the other's mine;³ but he is not responsible for injury to the other's mine caused by the beneficial working of his own,⁴ if such working is conducted in a reasonable manner.⁵

§ 718. Liability for condition of unfinished buildings. —

The owner of an unfinished building does not, by leaving it open and uninclosed, give any permission, much less any invitation, for the entry of strangers. He is, therefore, under no obligation to make it safe for their access,¹ or for their remaining there.² And persons having a right of way over the land occupied by the building are nevertheless trespassers if they enter it.³

§ 719. Trap-doors, hoistways, hatchways, etc. —

Trap-doors, hoistways, elevator-shafts, and similar openings in floors, unless far removed from those parts of the building which are lawfully used by persons not having actual notice of their existence,¹ should be protected so that no one exercising ordinary prudence could fall through them;² although his knowl-

³ Lord v. Carbon Iron Co., 38 N. J. Eq. 452; Thomas Iron Co. v. Allentown Mining Co., 28 Id. 77; Horner v. Watson, 79 Pa. St. 242. "The occupiers of the higher mine have no right to be active agents in sending water into the lower mine" (Baird v. Williamson, 15 C. B. N. S. 376, Erle, C. J.); and they must use reasonable diligence to prevent the flow of water from their mine into the lower (Locust, etc. Iron Co. v. Gorrell, 9 Phila. 247). See also Crompton v. Lea, L. R. 19 Eq. 115; Smith v. Fletcher, L. R. 7 Ex. 305; and compare Clegg v. Dearden, 12 Q. B. 576.

⁴ Smith v. Kenrick, 7 C. B. 515.

⁵ See Horner v. Watson (79 Pa. St. 242), where held that defendant must not work his mine according to a custom which was not reasonable.

¹ Roulston v. Clark, 3 E. D. Smith. 366; Castle v. Parker, 18 L. T. N. S.

367; Stevens v. Nichols, 155 Mass. 472; 29 N. E. 1150.

² Witte v. Stifel, 126 Mo. 295; 28 S. W. 891; Angus v. Lee, 40 Ill. App. 304.

³ Roulston v. Clark, *supra*; Peake v. Buell, 90 Wisc. 508; 63 N. W. 1053.

⁴ A mere licensee has no right to complain of the absence of guards about a hoistway (Gibson v. Leonard, 143 Ill. 182; 32 N. E. 182; Trask v. Shotwell, 41 Minn. 66; 42 N. W. 699; Beehler v. Daniels, 18 R. I. 563; 31 Atl. 582; and cases cited under § 705, *ante*).

⁵ Indermaur v. Dames, L. R. 1 C. P. 274; s. c., 2 C. P. 311 [unfenced hoistway]; Sunderlin v. Hollister, 4 N. Y. App. Div. 478; 38 N. Y. Supp. 682; Clopp v. Mear, 134 Pa. St. 203; 19 Atl. 504; Cleveland Provision Co. v. Limmermaier, 8 Ohio C. C. 701; McCormick Mach. Co. v. Burandt, 136 Ill. 170; 26 N. E. 588; Fisher v. Cook, 125 Ill. 280; 17 N. E. 763; Snyder v.

edge of the premises and of his proximity to an elevator shaft is not conclusive that he was not exercising due care when he fell into it in the dark.³ If it is impracticable to keep up a fence, as it sometimes is, for example, during the hoisting and delivery of goods through a hoistway, the person using it is bound to give actual notice of the danger to every person lawfully approaching the place; or in default thereof, he is liable for all injuries resulting therefrom.⁴ This is particularly true of unguarded hoistways opening upon a street.⁵ But in every case of an injury from an open hoistway or elevator shaft, it is necessary, in order to fix a liability therefor, that the negligence of the owner or occupant either in not protecting it by guards, or in omitting to give notice of danger, caused the injury.⁶ And a statutory requirement that all unenclosed

Witner, 82 Iowa, 652; 48 N. W. 1046; O'Brien v. Tatum, 84 Ala. 186; 4 So. 158.

³ Gordon v. Cummings, 152 Mass. 513; 25 N. E. 978; McRickard v. Flint, 114 N. Y. 222; 21 N. E. 153; Atkinson v. Abraham, 45 Hun, 238; Engel v. Smith, 82 Mich. 1; 46 N. W. 21. Compare Hutchins v. Priestly, etc. Co., 61 Mich. 252; 28 N. W. 85. An elevator shaft ran from the street to the basement of a hotel; the outer edge, by a movable railing, which protected it, had become loose and unsafe at one end, so that a guest at the hotel was, when leaning against the railing, precipitated into the area-way below. Held, he could recover (Hotel Assn. v. Walter, 23 Neb. 280; 36 N. W. 561). Where the fall of a freight elevator on which plaintiff was engaged hoisting grain, was due to the breaking of a clamp which held the car to the lifting ropes, which was not shown to have been defective nor was the cause of the break explained, held, a non-suit proper (Lawson v. Merrill, 69 Hun, 278; 23 N. Y. Supp. 560).

⁴ Engel v. Smith, 82 Mich. 1; 46 N. W. 21; Freer v. Cameron, 4 Rich.

Law, 238; Brosnan v. Sweetser, 127 Ind. 1; 26 N. E. 555; Hendricksen v. Meadows, 154 Mass. 599; 28 N. E. 1054.

⁵ In Karl v. Maillard (3 Bosw. 591), held, culpable negligence to have an open, unguarded hoistway within six feet of the entrance to the building. But in McIntire v. Roberts, (149 Mass. 450; 22 N. E. 13), where the opening of the shaft was separated from the sidewalk by a lintel three inches high and eighteen inches wide, defendant was held not responsible for injuries received by a passer-by who was accidentally pushed into the opening by third persons.

⁶ Huey v. Gahlenbeck, 121 Pa. St. 238; 15 Atl. 520; Clough v. Hoffman, 132 Pa. St. 626; 19 Atl. 299; Holzmänn v. Monell, 19 N. Y. App. Div. 238; 46 N. Y. Supp. 129 [defective rope; elevator fell]; Krey v. Schlusser, 62 Hun, 620; 16 N. Y. Supp. 695 [same]; Oystherbank v. Gardner, 49 N. Y. Superior, 263 [blind man mistaking door]; Sell v. Reitz Lumber Co., 70 Mich. 479; 38 N. W. 451 [warnings of danger held sufficient to exonerate defendant]; Fisher v.

hoistways, etc., shall be protected does not impose a civil liability upon the owner or occupant for a breach thereof, unless he would have been liable independently of the statute.⁷ But where a failure to comply with a statutory requirement is made a misdemeanor, evidence of such failure makes a *prima facie* case of negligence.⁸ The foregoing rule of liability applies equally to owners of vessels with respect to their hatches.⁹

§ 719a. Passenger elevators.—For the same reason—a regard for human life—that common carriers are required to exercise the highest degree of care for the safety of their passengers, irrespective of any contract of carriage,¹ a like degree of care is exacted of a landlord, in transporting persons by elevator between the several floors of his building.² He is therefore bound to use the greatest care, not only in providing safe and suitable cars, appliances and machinery for motion and control, but also in managing these means of transportation.³ But in providing the several accessories of the structure,

Jansen, 128 Ill. 549; 21 N. E. 598; South Bend Iron Works v. Larger, 11 Ind. App. 367; 39 N. E. 209.

⁷ Beehler v. Daniels, 18 R. I. 563; 31 Atl. 582. See Caldwell v. Slade, 156 Mass. 84; 30 N. E. 87. Under the New York statute, requiring trap-doors of elevators and hoistways to be kept closed, when not in actual use, one of several occupants of a building is not liable for the neglect of another in this respect (Harris v. Perry, 89 N. Y. 308). There is no joint and several liability between the tenants of the various floors (Donnelly v. Jenkins, 58 How. Pr. 252).

⁸ McRickard v. Flint, 114 N. Y. 222; 21 N. E. 153; Freeman v. Glens Falls Paper-Mill Co., 61 Hun, 125; 15 N. Y. Supp. 657. See McCauley v. Smith, 65 Hun, 620; 19 N. Y. Supp. 991.

⁹ See Baker v. Byrne, 58 Barb. 438; Tully v. Texas S. S. Co., 10 N. Y. App. Div. 463; 42 N. Y. Supp. 29; Andersen v. N. Y. & Cuba S. S. Co.,

13 N. Y. App. Div. 218; 43 N. Y. Supp. 213; Deming v. The Argonaut, 61 Fed. 517.

¹ See § 495, *ante*; and cases in next note.

² For many cases illustrating the application of the rule requiring great care on the part of passenger carriers see notes under § 496, *ante*. Placing a passenger elevator in a building is not a breach of the common-law duty prohibiting an act the natural and probable consequence of which would be imminently dangerous to the lives of other persons (Ziemann v. Kieckhefer Elevator Mfg. Co., 90 Wisc. 497; 63 N. W. 1021).

³ Mitchell v. Marker, 10 C. C. A. 306; 62 Fed. 139. The rule as to the degree of care required, and as to the *onus* of proof in case of injury from giving way of machinery, applicable between a common carrier of passengers and his passengers, is applicable as between the owner and manager of a passenger elevator and

in respect to which less serious results than loss of life are likely to result from a defect, no more than ordinary care is required of him.⁴ The rules requiring a common carrier to provide safe ways of ingress and egress to his vehicle, and to start or stop the same at a landing so that a person may safely enter and leave it, apply to this class of carriers.⁵ Persons who

the passengers in it. (*Goodsell v. Taylor*, 41 Minn. 207; 42 N. W. 873 [cable broke]). *s. p.*, *Hodges v. Percival*, 132 Ill. 53; 23 N. E. 423; *Treadwell v. Whittier*, 80 Cal. 574; 22 Pac. 266; *Lee v. Publishers' Co.*, 55 Mo. App. 390; *Oberfelder v. Doran*, 26 Neb. 118; 41 N. W. 1094 [defective axle-wheel beam]. See *Bourgo v. White*, 159 Mass. 216; 34 N. E. 191 [construction of statute as to appliances and inspection]; *Boehm v. Mace*, 28 Abb. N. C. 138; 18 N. Y. Supp. 106 [same]; *Guichard v. New*, 84 Hun, 54; 31 N. Y. Supp. 1080 [same].

⁴ See cases cited under §§ 410, 501, *ante*; *McGrell v. Buffalo Office Bldg. Co.*, 153 N. Y. 265; 47 N. E. 305; *rev'g* 90 Hun, 30. In that case, the car itself had no door, the entrance thereto being through a door in the iron grating which inclosed the shaft, according to the customary manner in similar buildings. A passenger sprung from the rear of the car while in motion, caught hold of the shaft bars, fell between them and the floor of the car, and was fatally injured. Elevators so inclosed had been in use for years without a similar accident. Held, that, in the absence of anything showing that the owner could have anticipated or foreseen any such result from the manner in which the elevator was inclosed, he was not chargeable with negligence (*Shattuck v. Rand*, 142 Mass. 83; 7 N. E. 43). See *Kentucky Hotel Co. v. Camp*, 97 Ky. 424; 30 S. W. 1010 [passenger's foot caught

between car door and joists; defendant liable]; *Colorado Mortg. etc. Co. v. Rees*, 21 Colo. 435; 42 Pac. 42 [insufficient lock on door opening into shaft].

⁵ In *Dawson v. Sloane* (100 N. Y. 620; *aff'g* 49 N. Y. Superior, 304), the elevator boy was sitting beside the open door of elevator shaft, and a passenger, supposing the platform to be there, stepped in and fell to the bottom; held, for the jury to decide if the acts of the boy were not such as to throw plaintiff off his guard; verdict for plaintiff sustained. A passenger may assume, when the door is thrown open by an attendant, that it is safe to enter it without stopping to look, listen, or make a special examination (*Tousey v. Roberts*, 114 N. Y. 312; 21 N. E. 399; *aff'g* 53 N. Y. Superior, 446). *s. p.*, *Morrison v. Metropolitan Tel. Co.*, 69 Hun, 100; 23 N. Y. Supp. 257 [duty to guard open door]; *People's Bank v. Morgolofski*, 75 Md. 432; 23 Atl. 1027 [same]; *Murphy v. Hays*, 68 Hun, 450; 23 N. Y. Supp. 70 [sudden starting]; *Mitchell v. Keene*, 87 Hun, 266; 33 N. Y. Supp. 1045 [starting before passenger had time to alight]; *Middleton Co. v. Roycroft*, 33 Ill. App. 381 [shaft dark; no one in charge]; *Colorado Mortg. Co. v. Rees*, 21 Colo. 435; 42 Pac. 42 [door of shaft open; dark hall]; *Mau v. Morse*, 3 Colo. App. 359; 33 Pac. 283 [entrance not protected]. On the question of contributory negligence, see *Taylor v. Carew Mfg. Co.*, 143 Mass. 470; 10 N. E. 308; *Hackett v*

take an elevator assigned for carrying goods only, are under the same rules which limit the rights of passengers on freight trains.⁶

§ 720. **Traps for trespassers.** — Prior to 1827, it was held by the English courts that the owner of land might lawfully place spring-guns and other deadly man-traps upon any part of his premises, for the purpose of punishing trespassers,¹ provided sufficient notice was given of their existence.² And it was held that such traps might be placed even upon uninclosed land.³ But this callous disregard of the general principle which forbids the punishment of mere trespass with death or wounds was never approved in America; and such decisions cannot be too strongly condemned. They were the natural outcome of the brutal criminal code, which punished petty larceny, in many cases, with death, and burned women alive for false coining. Even such a code, however, afforded no justification for putting the power of inflicting death into the hands of private individuals, in defense of a mere right of

Middlesex Mfg. Co., 101 Mass. 101; Stringham v. Stewart, 100 N. Y. 516; 3 N. E. 575; Knox v. Hall Steam-Power Co., 69 Hun, 231; 23 N. Y. Supp. 490; O'Brien v. Western Steel Co., 100 Mo. 182; 13 S. W. 402; Greenwell v. Washington Market Co., 21 D. C. 298.

⁶ See § 513a; also, Patterson v. Hemenway, 148 Mass. 94; 19 N. E. 15; Ferris v. Aldrich, 58 Hun, 610; 12 N. Y. Supp. 482; McKinnie v. Kilgallon [Pa.], 11 Atl. 614. Where defendant provides both a passenger and a freight elevator, there is an express invitation to take the passenger elevator; and one injured by defects on the freight elevator cannot recover (*Amerine v. Porteous*, 105 Mich. 347; 63 N. W. 300).

¹ The defendant was the owner of a large wood, in which he had set a number of spring-guns. The plaintiff, with a companion, was out gathering nuts, in the daytime, and proposed to his companion to enter

this wood. His companion at first refused, telling him that spring guns were set there, but they afterwards concluded to enter the wood; and while there, the plaintiff trod on a wire connecting with one of the guns, and was badly injured. Held, that the action could not be maintained (*Hott v. Wilkes*, 3 Barn. & Ald. 304). It is fair to say that the judges themselves were evidently ashamed of their decision, and that the defendant did not venture to claim costs.

² In *Bird v. Holbrook* (4 Bing. 628), the defendant, for the protection of his property, some of which had been stolen, set a spring-gun, *without notice*, in a garden completely walled round, and at a distance from his house, and plaintiff, who had climbed over the wall in pursuit of a strayed fowl, was shot; held, that the defendant was liable in damages.

³ *Jordin v. Crump*, 8 Mees. & W. 782.

property. Accordingly, these decisions were never good law in this country;⁴ and they were overruled by the British Parliament, which, though wholly composed of land-owners, was shocked by the rulings of the judges; and, in 1827, the placing of such dangerous traps, elsewhere than in dwelling-houses, was prohibited.⁵ It appears to be lawful in America to set man-traps in dwellings and warehouses, for the purpose of injuring burglars,⁶ although not in open spaces or in such manner as to endanger innocent persons,⁷ even when technically trespassing. The question is hardly one of negligence, merely; and we need not pursue it further. A land-owner never had the right to place a bait for animals, so as to tempt them into his traps; and he was liable for so doing, even to the owner of trespassing animals.⁸ If cattle stray upon uninclosed land and injure themselves by eating deleterious matter which has been left there by the land-owner, without any malicious intent, the latter is not liable to the owner of the cattle.⁹

§ 721. Dripping water and snow. —The erection of a building of any kind inevitably concentrates a quantity of the rainfall, and gives it a direction which it would not naturally have. The owner is, therefore, bound to see that the flow of water thus caused does not inflict greater injury upon the adjoining owners than would happen from the rain falling upon the ground in a natural state. He has no right to let the water drip from his roof upon his neighbor's premises, nor even to

⁴ *Johnson v. Patterson*, 14 Conn. 1.

⁵ Stat. 7 & 8 Geo. IV, c. 18; 24 & 25 Vic., c. 100, § 31; *Wootton v. Dawkins*, 2 C. B. N. S. 412.

⁶ A warehouseman held not liable for the value of a slave who was shot by a spring-gun while breaking into the warehouse at night (*Gray v. Combs*, 7 J. J. Marsh. 478).

⁷ *State v. Moore*, 31 Conn. 479.

⁸ If a man places dangerous traps, baited with flesh, on his own ground, so near to a highway or to the premises of another that dogs, passing along the highway or kept in his neighbor's premises, must probably be attracted by their instinct into

the trap, and in consequence of such act, his neighbor's dogs are so attracted and thereby injured, an action on the case lies (*Townsend v. Wathen*, 9 East, 277). In Connecticut, a man was held liable for scattering poisoned meal upon his land for the purpose of destroying his neighbor's fowls even with notice to him (*Johnson v. Patterson*, 14 Conn. 1).

⁹ So held, where straying cattle drank maple syrup on a neighbor's land (*Bush v. Brainard*, 1 Cow. 78); and where they ate pickles and brine (*Hess v. Lupton*, 7 Ohio, 216). See § 701. note 4, *ante*.

let it drip upon his own land in such manner as to overflow his neighbor's ground,¹ or upon the highway;² and it is no defense to show that the roof is constructed in the usual manner.³ The same principle obviously must govern, where snow accumulates on a roof, and does injury by sliding off in a mass.⁴

§ 722. [consolidated with § 709.]

§ 723. Occupant's liability for leakage. — The occupant of an upper floor, whether the owner or a tenant, is bound to use ordinary care to prevent water or other injurious substances from leaking down.¹ If the landlord provides pipes and other plumbing work of good quality and surrenders possession, the tenant only is responsible for the mode in which these things are used, and for any overflow, caused either by neglect to turn off the water, or by such misuse of the works as deprives them of power to stop the flow of water.² Where two or more tenants occupy separate holdings in the upper part of a building, and all have access to, and a right to use, a faucet, they do not become jointly liable for its misuse; and mere proof that it was negligently left running, without showing by

¹ *Bellows v. Sackett*, 15 Barb. 96; 66 Hun, 629; 20 N. Y. Supp. 914). *Thomas v. Kenyon*; 1 Daly, 132; See § 343, *ante*.

Chandler v. Lazaras, 55 Ark. 312; 18 S. W. 181; *Meister v. Lang*, 28 Mass. 194; s. c. before, 101 Id. 251.

² *Shibley v. Fifty Associates*, 106 Mass. 194; s. c. before, 101 Id. 251. ⁴ *Ib.* If *Lazarus v. Toronto* (19 Upper Can. Q. B. 9) decides otherwise, it is not good law.

¹ *Stapenhorst v. American Mfg. Co.*, 15 Abb. N. S. 355; *Inman v. Potter*, 18 R. I. 111; 25 Atl. 912.

² *Weston v. Tailors of Potter-row*, Hay, 66; 14 F. C. 1232. So held, where an upper tenant allowed a water-closet in good repair to overflow (*White v. Montgomery*, 58 Ga. 204). By improper use of some unknown person the closet became obstructed, and the water overflowed. Held, landlord not liable (*Kenny v. Barns*, 67 Mich. 336; 34 N. W. 587).

³ One who allows water to flow from his premises upon a sidewalk, where it freezes, is liable to persons who are injured by falling on the ice (*McGoldrick v. N. Y. Central R. Co.*,

whom, is not enough to charge any of them with liability for the injury done.³ The occupant of an upper floor is undoubtedly liable for damage caused by his negligence⁴ in leaving a faucet open;⁵ and he has been held liable for the similar negligence of his visitors⁶ and to his bailor.⁷ But a tenant is under no absolute obligation to tenants of lower floors to keep the plumbing appliances of his floor in such a condition that no water shall drip down: his duty is one of ordinary care; and he is not responsible for concealed defects,⁸ nor for the unauthorized act of a third person;⁹ nor is he liable where proper care by the injured lower tenant would have prevented the injury.¹⁰

§ 724. Liability where landlord and tenant are both in fault.—A more difficult question arises where the landlord

³ Moore v. Goedel, 7 Bosw. 591; aff'd, 34 N. Y. 527. Compare Ort-mayer v. Johnson, 45 Ill. 469.

⁴ Not liable when overflow was caused by rats making a hole in the water pipe under the floor, during the night (Steinweg v. Biel, 16 N. Y. Misc. 47; 37 N. Y. Supp. 678). See Clarke v. Anderson, 14 Daly, 464 [insufficient proof of negligence]. The fact of an overflow in premises exclusively occupied by a tenant is *prima facie* evidence of negligence (Simon-Reigel Cigar Co. v. Gordon-Burnham Co., 20 N. Y. Misc. 598; 46 N. Y. Supp. 416). Defendant had goods in a building and agreed to pay the rent, but it did not appear that he or his agent were ever on the premises to which others had access; held, not liable for negligence in leaving a water faucet open (Denton v. Kernochan [Com. Pl.], 13 N. Y. Supp. 899; citing Donnelly v. Jenkins, 9 Daly, 41; Robbins v. Mount, 4 Robt. 553; Harris v. Perry, 23 Hun, 244).

⁵ Simonton v. Loring, 68 Me. 164; Rosenfield v. Arrol, 44 Minn. 395; 46 N. W. 768; Curran v. Weiss, 6 N.

Y. Misc. 138; 26 N. Y. Supp. 8; see Ham v. New York, 70 N. Y. 459.

⁶ Killion v. Power, 51 Pa. St. 429.

⁷ A recovery allowed for injury to goods, caused by the negligence of the occupant of upper floor causing an overflow of water, to goods on the first floor lawfully there, though plaintiff was neither owner, lessee nor sub-lessee (Peiser v. Shanning, 14 Daly, 399; 13 N. Y. State, 63).

⁸ Ross v. Fedden, L. R. 7 Q. B. 661.

⁹ Rosenfield v. Newman, 59 Minn. 156; 60 N. W. 1085 [stranger cast a rag into sink, which stopped the outlet, and left faucet open].

¹⁰ Brown v. Elliott, 4 Daly, 329; Buckley v. Cunningham, 103 Ala. 449; 15 So. 826. A covenant in a lease by which a tenant of a lower story agrees to shut off the water in the basement at night precludes a recovery by him from a tenant of an upper floor, whose negligence has caused an overflow of water, on a night when the water was not shut off (Walker v. Globe Mfg. Co., 56 N. Y. Superior, 431; 4 N. Y. Supp. 193). See Lissa v. Goodkind, 57 N. Y. Superior, 60; 5 N. Y. Supp. 835).

provides apparatus which, if used with more than ordinary care, is sufficient, but which a tenant uses carelessly, and thus produces an overflow. In such cases, the injury suffered by the lower tenant is really the result of the concurring negligence of the landlord and the upper tenant; and where this is fully established, and the tenant has not used ordinary care, of course both are liable for the damage. But in many cases it is very difficult to determine which party is really in fault. The tenant is not responsible, if he used ordinary care; and the landlord is not, if he used the same. Where the landlord has provided apparatus which is obviously defective, the tenant must either abstain from using it, or must use it with a degree of caution which would be wholly unnecessary if proper works had been put up. But where the defect is not obvious, and is not in fact known to the tenant (which is in such a case to be presumed), he is not bound to use more care than the external appearance of the works seems to demand. Thus, if a faucet is left without any waste-pipe, the tenant ought to use it with extreme caution; but if a waste-pipe is provided, the tenant has a right to presume that it is not choked, and that it is capable of carrying off a moderate stream of water.¹

§ 725. **Wharfingers, etc.** — The owner, lessee¹ or any other person having the exclusive use² of a dock, pier, or wharf,

¹In *Robbins v. Mount* (4 Robertson, 553), one of these difficult questions came before the court. The landlord of a building, leased to a number of separate tenants, provided a janitor who received his wages from the tenants. A faucet was left running by the janitor's servant into a urinal which was partly choked up with tobacco, and had no outlet at the top, and great damage was thereby caused to the plaintiffs, who were tenants below. A verdict against the landlord was set aside on appeal, the court holding that the janitor was, *ad hoc*, the tenant's servant, and that, the evidence showing that the urinal was such as was commonly used when it

was put up, it was not negligence in the landlord to leave it there, although a new article had been introduced, which was not liable to be choked by anything thrown into it. We think that the court erred in holding that the janitor was not the landlord's servant; but on the other point its decision seems to be correct.

¹*Leary v. Woodruff*, 4 Hun, 99; *Gluck v. Ridgewood Ice Co.*, 56 Id. 642; 9 N. Y. Supp. 254; *Oceanic Steam Nav. Co. v. Campania Tr. Espanola*, 134 N. Y. 461; 31 N. E. 987 [action over by lessee against sub-lessee].

²*Onderdonk v. Smith*, 27 Fed. 874; see *Campbell v. Portland*, 62

receiving tolls for its use, is bound to keep it in reasonably good condition, so that, as far as by the use of ordinary care, diligence and skill, he can make it so,³ it shall be fit for the use of vessels, and safe for the purpose for which it was intended,⁴ for all persons to enter upon, who have a right of access. If the wharfinger receives tolls from the public generally, he owes this duty to the public, and is liable to any one specially injured by his neglect to fulfill it;⁵ but if he throws the wharf open to the use of the public without charge, he is only liable for such defects as amount to a public nuisance.⁶ He is not liable to a trespasser, for mere negligence;⁷ nor is he in any

Me. 552. The lessor of a dock for unloading stone, charging toll for each boat-load, is liable to a boatman for personal injuries caused by the unsafe condition of the dock, and it is no defense that the legal title to the unsafe part of the dock was in a third person, or that defendant had no legal right to go upon or repair it (*Thomas v. Henjes*, 131 N. Y. 453; 30 N. E. 238).

³*Chapman v. State*, 104 Cal. 690; 38 Pac. 457; *McCaldin v. Parke*, 142 N. Y. 564; 37 N. E. 622. In *Willey v. Allegheny* (118 Pa. St. 490; 12 Atl. 453), held that the owner of a public wharf must use the utmost care in providing means of fastening, having regard to the danger incurred and the magnitude of the interests at stake.

⁴*Swords v. Edgar*, 59 N. Y. 28; *Plant Inv. Co. v. Cook*, 20 C. C. A. 625; 74 Fed. 503. Where the wharf extended out from a public street, and there was nothing to indicate the character of the lessee's possession, or that it intended to exclude the public therefrom, plaintiff was not a trespasser in going thereon (*Delaney v. Pennsylvania R. Co.*, 78 Hun, 393; 29 N. Y. Supp. 226).

⁵*Pittsburgh v. Grier*, 22 Pa. St. 54; *Radway v. Briggs*, 37 N. Y. 256; *Swords v. Edgar*, *supra*; *Taylor v.*

New York, 4 E. D. Smith, 559; *Buckbee v. Brown*, 21 Wend. 110; *Cannavan v. Conklin*, 1 Daly, 509; *Wendell v. Baxter*, 12 Gray, 494; *White v. Phillips*, 15 C. B. N. S. 245; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93; *Newall v. Bartlett*, 114 N. Y. 399; 21 N. E. 990 [fall of door of a dock warehouse].

⁶*Kennedy v. New York*, 73 N. Y. 365 [no string piece on pier; horse backed off cart]. A pier is to be treated as a public street; and, when it becomes out of repair, it is a public nuisance (*Ahern v. Steele*, 48 Hun, 517; 1 N. Y. Supp. 259; *rev'd*, on another point, 115 N. Y. 203; 22 N. E. 193). A steamboat company must exercise reasonable care in protecting persons who come to meet its passengers on its wharves, whether owned or rented by it (*York v. Canada Atl. S. S. Co.*, 22 Can. S. C. 167). See *Hall v. Tillson*, 81 Me. 362; 17 Atl. 302.

⁷*Onderdonk v. Smith*, 27 Fed. 874. A customs officer searching for smugglers fell into the water through an unguarded and unlighted opening in the wharf. Held, he could recover (*Low v. Grand Trunk R. Co.*, 72 Me. 313). In *Malloy v. Staten Isl. Rapid Tr. R. Co.* (78 Hun, 166; 28 N. Y. Supp. 979), plaintiff gained access to defendant's pier, which

case held to guarantee the safety of the dock.⁸ It is culpable negligence to permit anything to project from the side of a wharf, in such a manner as, by any probable combination of circumstances, to endanger the safety of vessels moored to the wharf.⁹ They are entitled to the unobstructed use of the water, whether it rises or falls.¹⁰

§ 726. Inspection of wharves.—A wharfinger, receiving toll, does not fulfill his obligation by simply keeping the wharf or dock clear of obstacles and defects which are visible upon an external inspection; but he is bound to make such further inspection as its construction, use and exposure reasonably require.¹ A dock ought to be dredged and cleaned with sufficient fre-

was inclosed from the street, through adjoining premises, and was injured while fishing therefrom. Held, a trespasser, and defendant was under no obligation to him in reference to the management of its boat.

⁸See *Exchange Ins. Co. v. Delaware, etc. Canal Co.*, 10 Bosw. 180. He is not liable for damage occasioned to a vessel by fire communicated from premises not owned by him, through floating oil that escaped from sources over which he had no control (*Hustede v. Atlantic Refining Co.*, 68 Fed. 669).

⁹Defendant's wharf, instead of being perpendicular below the water-line, extended considerably into the slip. From one of the beams a spike projected, which injured the bottom of plaintiff's vessel. Held, in the absence of evidence of reasonable care and examination of the condition of the wharf, defendant was liable (*Smith v. Havemeyer*, 32 Fed. 844). *s. p.*, *O'Rourke v. Peck*, 40 Fed. 907 [dangerous condition of bottom along side of wharf]. Plaintiff's intestate, while standing on the deck of his barge, moored at defendant's dock, was killed by the fall of a derrick on the dock. Held, sufficient to sustain a finding of

negligence (*Thomas v. Henjes*, 62 Hun, 620; 16 N. Y. Supp. 700; *aff'd* 131 N. Y. 453). In *Hart v. Delaware, etc. R. Co.* (76 Hun, 296; 27 N. Y. Supp. 767), an employee on a float was injured by a projecting key, used to fasten floats to a floating bridge at defendant's wharf, as the float approached said bridge in the evening. Such keys were usually pulled back when floats were not at the wharf, and this could be done in two minutes. Held, error to dismiss the complaint.

¹⁰A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored a vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and, on the falling of the tide, the bowsprit of B.'s vessel, coming in contact with A.'s mast, broke it. Held, that B. was not responsible (*Dalton v. Denton*, 1 C. B. N. S. 672).

¹*Wendell v. Baxter*, 12 Gray, 494. In *Albert v. State* (66 Md. 325), the lessor was held liable because he might have known the rotten condition of the wharf by reasonable diligence; following *Owings v. Jones*, 9 Md. 168.

quency to enable all such vessels as are accustomed to enter it to do so without stranding or dragging.² And if for any reason the owner of the dock cannot do this, or claims to be released from the obligation to do so, he must withdraw all express or implied invitation for the entry of vessels; and, if they are accustomed to enter, paying toll, he must close the dock, or in some other way distinctly warn them to keep out of it.³ The existence of piles or other obstructions under the water, and projecting above the ground at the bottom, is presumptive evidence of negligence; and it is not a sufficient excuse to show that the owner, at the time of an injury thus caused, did not place the obstructions there, or even know of their existence. He should have tested the safety of the dock.⁴

§ 727. [omitted.]

² *Vroman v. Rogers*, 132 N. Y. 167; *New York*, 37 Id. 160; *Union Ice Co. v. Crowell*, 5 U. S. App. 270; 5 C. C. A. 49.
 30 N. E. 388; *Buckbee v. Brown*, 21 Wend. 110; *Post v. Lincoln*, 25 Fed. 835; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93. See *Barber v. Abendroth*, 102 N. Y. 406; 7 N. E. 417; *McCaldin v. Parke*, 142 N. Y. 564; 37 N. Y. 622; *Seaman v. New York*, 80 N. Y. 239; *Carlton v. Franconia Iron Co.*, 99 Mass. 216; *Low v. Grand Trunk R. Co.*, 72 Me. 313.

³ *Mersey Docks v. Gibbs*, *supra*; *Barber v. Abendroth*, 102 N. Y. 406; 7 N. E. 417 [failure to warn against entering by night tide]; *O'Rourke v. Peck*, 29 Fed. 223; *The C. P. Harris*, 33 Id. 295; *Manhattan Tr. Co. v. Hurlst. & C.* 153.

⁴ Mere ignorance of the defects is not a good defense (*Mersey Docks v. Gibbs*, *supra*; *White v. Phillips*, 15 C. B. N. S. 245). A previous owner had excavated the land below water, in front of the wharf, and had supported the ground beyond by piles. The earth had gradually washed away, leaving the piles bare. Held, present owner was liable for an injury caused to a vessel by these piles (*White v. Phillips*, 15 C. B. N. S. 245). See *Bartlett v. Baker*, 3

CHAPTER XXXVII.

WATER AND WATER COURSES.

§ 728. Artificial collections of water.	§ 733. Diversion of water-course.
729. Rights of riparian owners.	734. Fouling of streams and wells.
730. Erection of dams.	735. Drainage of surface water.
731. Overflowing banks of streams.	736. Interference with water.
732. Care in construction and maintenance of dams.	737. Obstruction of navigation.
	738. Obligation to remove wrecks.

§ 728. **Artificial collections of water.** — The liability of an owner of land for the escape to adjacent premises of water artificially collected by him is governed by the general rule, already stated, which makes a land-owner responsible for the damages caused by an escape due to his failure to use ordinary care to prevent it; unless the thing confined was, by its nature, reasonably certain to escape and cause damage. In such case, the act of accumulating and confining it is actionable, irrespective of any question of subsequent negligence in failing to keep it in.¹ If the presence of such artificial accumulation causes the water to percolate through the soil, which would not otherwise occur, the owner is liable for any injury thereby resulting to adjacent land.² And whether he makes an arti-

¹ See cases cited under § 701*a ante*.

² *Monson, etc. Mfg. Co. v. Fuller*, 15 Pick. 554; *Fuller v. Chicopee Mfg. Co.*, 16 Gray, 46; *Wilson v. New Bedford*, 108 Mass. 261; *Pixley v. Clark*, 35 N. Y. 520; *Jutte v. Hughes*, 67 Id. 267; *Mairs v. Manhattan R. E. Assoc.*, 89 Id. 506; *Reed v. State*, 108 Id. 407; 15 N. E. 735. A railway company, owning land directly over a mine, made excavations by means of which a porous rock was reached, so that water could filter through it into the mine. In consequence of the obstruction of the stream during a

great flood, the water overflowed its banks, poured into the excavation, and from thence percolated into the plaintiff's mine. If defendant's drains had been properly constructed the water would have been carried away from the excavation. Held, that the company was liable, as the overflow was caused by its negligence in not keeping a sufficient drain (*Bagnall v. Northwestern R. Co.*, 1 Hurlst. & C. 544; *aff'g 7 Hurlst. & N. 423*). s. p., *Hurdman v. Northeastern R. Co.*, L. R. 3 C. P. Div. 168.

ficial collection of water, or it comes naturally upon his land,³ in either case, if he uses it in a manner which he ought to foresee will involve danger to others beyond his power to prevent,⁴ his subsequent exercise of care will not excuse him. But if he has a reasonable expectation that he will be able to control it, the owner or occupant of the land is not liable for damage done by water which he has introduced, or which he has diverted from its natural flow, unless he fails to exercise due care and diligence in its use.⁵ He is guilty of negligence if he fails to anticipate and provide security against the ordinary changes of temperature, floods, etc., to which the country is subject;⁶ but he is not liable for the consequences of natural events which are of such rare occurrence that he could not reasonably anticipate them.⁷

³ See §§ 735, 736, *post*.

⁴ *Jutte v. Hughes*, 67 N. Y. 268; *Thomas v. Kenyon*, 1 Daly, 132; *Griffith v. Lewis*, 17 Mo. App. 605; *Jenkins v. Hooper Irrigation Co.*, 13 Utah, 100; 44 Pac. 829. Defendants permitted the water to overflow the banks of their ditch and flood plaintiff's land, though they had been warned that the ditch was running too full, and that the water was in danger of escaping unless the flow was diminished. Held, that defendants were liable for increasing the flow (*Greeley Irrigating Co. v. House*, 14 Colo. 549; 24 Pac. 329); and the fact that the banks were weakened by the burrowing of gophers is no defense (*Ib.*). Defendant kept a delph (a species of drain), the banks of which were strong enough to resist the pressure of water properly coming therein, but not sufficiently strong to bear the pressure of an amount of water which was frequently in the delph through the neglect of other persons whose duty it was to keep a certain outlet free. On one of these occasions the banks gave way; held, that defendant was liable (*Harrison v.*

Great Northern R. Co., 3 Hurlst. & C. 231).

⁵ In *Whitehouse v. Birmingham Canal Co.* (5 Hurlst. & N. 928), plaintiff's land had been overflowed by water from defendant's canal, but if defendant had attempted to confine the water within the canal, it would have burst the banks, and have done much greater damage. The jury found that defendant did all that was in his power under the circumstances. Held, that defendant was not liable. And see *Beard v. Murphy*, 37 Vt. 99; *Nitro-Phosphate, etc. Co. v. London, etc. Docks Co.*, L. R. 9 Ch. D. 503.

⁶ *Gray v. Harris*, 107 Mass. 492. There held, that in building a drain, provision must be made not only for the ordinary freshets which occur in spring and fall, but for more extraordinary storms, such as are known to occur only once in several years and at no regular intervals. See *Augusta v. Lombard*, 93 Ga. 284; 20 S. E. 312.

⁷ An overflow, caused by a frost more severe than had been known for twenty-five years, bursting the defendant's pipes, was held to afford

§ 729. **Rights of riparian owners.** — It is a general principle that every owner of land upon a natural stream of water¹ has a right to use the water for any reasonable² purpose or his own, not inconsistent with a similar right in the owners of the land above, below, and opposite to him. He may take the water to supply his dwelling, to irrigate his land³ or to quench

no ground of action (*Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781).

¹ A natural water-course defined: *Pyle v. Richards*, 17 Neb. 180; *Van Orsdol v. Burlington, etc. R. Co.*, 56 Iowa, 470; *Union Pacific R. Co. v. Dyche*, 31 Kans. 120. Mere surface water from rain or melting snow flowing through a ravine is not a water-course (*Wagner v. Long Island R. Co.*, 2 Hun, 633; *Lessard v. Stram*, 62 Wisc. 112; *Hoyt v. Hudson*, 27 Id. 656). "A water-course need not be shown to flow continuously; its channel may sometimes be dry; but there must always be substantial indications of a stream which is ordinarily and most frequently a moving body of water flowing through it" (*Hill v. Cincinnati, etc. R. Co.*, 109 Ind. 511). See, also, *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Benson v. Chicago, etc. R. Co.*, 78 Mo. 504; *Swett v. Cutts*, 50 N. H. 439; *Byrne v. Minneapolis, etc. R. Co.*, 38 Minn. 212; 36 N. W. 339; *Sullens v. Chicago, etc. R. Co.*, 74 Iowa, 659; 38 N. W. 545; *Moore v. Chicago, etc. R. Co.*, 75 Iowa, 263; 39 N. W. 390; *Rigney v. Tacoma Water Co.*, 9 Wash. 576; 38 Pac. 147.

² The reasonableness of the use is ordinarily to be determined by the jury (*Colrick v. Swinburne*, 105 N. Y. 503; 12 N. E. 427; *Prentice v. Geiger*, 74 N. Y. 341; *Hayes v. Waldron*, 44 N. H. 580; *Snow v. Parsons*, 23 Vt. 459; *Wheatley v. Baugh*, 25 Pa. St. 535; *Lux v. Hag-*

gin [Cal.], 4 Pac. 919). And in such determination the benefit to the owner is to be compared with the injury to others (*Rindge v. Sargent*, 64 N. H. 294; 9 Atl. 723). For illustrations of what will be deemed a reasonable or unreasonable use of the water, see *Thurber v. Martin*, 2 Gray, 394; *Elliot v. Fitchburg R. Co.*, 10 Cush. 191; *Gillett v. Johnson*, 30 Conn. 180; *Tourtellot v. Phelps*, 4 Gray, 376; *Gould v. Boston Duck Co.*, 13 Id. 442; *Wood v. Edes*, 2 Allen, 580; *Honsee v. Hammond*, 39 Barb. 89; *Boyd v. Conklin*, 54 Mich. 583. The quantity of water used in a very dry season, when the stream is low, may be more unreasonable than the quantity used in a wet season, when the stream is high (see *Hetrich v. Deachler*, 6 Pa. St. 32; *Miller v. Miller*, 9 Id. 74; *Newhall v. Ireson*, 8 Cush. 595).

³ In England, the use of the water of a stream for irrigation is not allowed (*Chasemore v. Richards*, 2 Hurlst. & N. 168; 7 H. L. Cas. 349; *Embrey v. Owen*, 6 Exch. 353; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; see *Crossley v. Lightowler*, L. R. 3 Eq. 290); but in this country it is universally allowed (see *Elliot v. Fitchburg R. Co.*, 10 Cush. 194; *Arnold v. Foot*, 12 Wend. 330; *Blanchard v. Baker*, 8 Me. 253; *Evans v. Merriweather*, 4 Ill. 496; *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Id. 420; *Anthony v. Lapham*, 5 Pick. 175; *Randall v. Sliverthorn*, 4 Pa. St. 173; *Wadsworth v. Tillotson*, 15

the thirst of his cattle;⁴ though the stream be subterranean.⁵ He may also use it for manufacturing purposes, such as the supplying of steam boilers, or the running of water wheels or other hydraulic works. But this is a mere privilege running with the land, not a property in the water itself,⁶ and, in the case of a navigable stream, is subordinate to public uses.⁷ A riparian owner must not, therefore, seriously diminish the quantity,⁸ or deteriorate the quality, of the water which would

Conn. 366; *Pollitt v. Long*, 3 Thomp. & C. 232; *Fleming v. Davis*, 37 Tex. 173).

⁴ *Jones v. Adams*, 19 Nev. 78; 6 Pac. 442; *Learned v. Tangeman*, 65 Cal. 334.

⁵ *Shively v. Hume*, 10 Oreg. 76. See note 8, § 733, *post*.

⁶ Every proprietor is entitled to the use of the flow of water in its natural course, and to the momentum of its fall on his own land. The owner has no property in the water. He may use it as it passes; but he cannot unreasonably detain it; and he cannot divert or diminish the quantity (*Van Hoesen v. Coventry*, 10 Barb. 518; *Garwood v. N. Y. Central R. Co.*, 17 Hun, 356; *Corning v. Troy Iron Co.*, 40 N. Y. 191; *Colburn v. Richards*, 13 Mass. 420; *Anthony v. Lapham*, 5 Pick. 175; *Red River Mills v. Wright*, 30 Minn. 249).

⁷ Therefore a riparian owner who has, by authority, dammed a navigable stream for the purpose of accumulating power, is not entitled to compensation for water diverted by a city, though the consumers are charged by the city for the water used (*Minneapolis Mill Co. v. St. Paul*, 56 Minn. 485; 58 N. W. 33). See *Falls Manuf'g Co. v. Oconto River Imp. Co.*, 87 Wisc. 134; 58 N. W. 257).

⁸ *Garwood v. N. Y. Central R. Co.*, 83 N. Y. 400; *Corning v. Troy Iron, etc. Co.*, 40 Id. 191; *West Point Iron Co. v. Reimert*, 45 Id. 705; *Gilzinger*

v. Saugerties Water Co., 66 Hun, 173; 21 N. Y. Supp. 121; *aff'd*, on opinion below, 142 N. Y. 633. The foregoing cases were for an injunction and damages; and in last case, held not to lie with defendant to say that plaintiff had water enough left for the uses of his mill, or would have enough if he properly controlled or secured it. In *N. Y. Rubber Co. v. Rothery* (132 N. Y. 293; 30 N. E. 841) [action for damages for diversion of water], held, that a riparian owner's rights in a stream, and his cause of action for their redress, were not conditioned on a mere beneficial user of them. The diversion of the water of a spring which rose on defendant's land, from its natural channel, so as to wholly deprive plaintiff of its use for his tannery, held to be unreasonable (*Colrick v. Swinburne*, 105 N. Y. 503; 12 N. E. 427). See *Ware v. Allen*, 140 Mass. 513; *Wilcox v. Hausch*, 64 Cal. 461; *Learned v. Tangeman*, 65 Cal. 334; *Lux v. Haggin*, 65 Cal. 334; 4 Pac. 919; *Moore v. Clear Lake Water Works*, 68 Cal. 146; 8 Pac. 816; *Jones v. Adams*, 19 Nev. 78; 6 Pac. 442; *Mason v. Cotton*, 4 Fed. 792; *Dumont v. Kellogg*, 29 Mich. 420; *Dayton v. Robert*, 8 Ohio, C. C. 649; *Ulbricht v. Eufala Water Co.*, 86 Ala. 587; 6 So. 78. To same effect, *Pennsylvania R. Co. v. Miller*, 112 Pa. St. 34; *Van Orsdol v. Burlington, etc. R. Co.*, 56 Iowa, 470.

descend, if, by so doing, he deprives another riparian owner of the beneficial use of the water,⁹ though he furnish him an equivalent supply from another source,¹⁰ unless he has gained a title by grant¹¹ or prescription so to use the same.¹² So he cannot legally increase the quantity of water which flows through or along his land, to the injury of another land-

⁹ Embrey v. Owen, 6 Exch. 370; Chasemore v. Richards, 2 Hurlst. & N. 168; 7 H. L. Cas. 349; Mason v. Hill, 5 Barn. & Ad. 1; Honsee v. Hammond, 39 Barb. 89; Amsterdam Knitting Co. v. Dean, 13 N. Y. App. Div. 42; 43 N. Y. Supp. 29; Livingston v. Adams, 8 Cow. 175; Arnold v. Foot, 12 Wend. 330; Whittier v. Cochecho Mfg. Co., 9 N. H. 454; Holden v. Winn. Lake Cotton Co., 53 Id. 552; Buddington v. Bradley, 10 Conn. 213; Wadsworth v. Tillotson, 15 Conn. 366; Johnson v. Lewis, 13 Id. 303; Blanchard v. Baker, 8 Me. 253; Davis v. Fuller, 12 Vt. 178; Norton v. Volentine, 14 Id. 239; Howell v. McCoy, 3 Rawle, 256; Hoy v. Sterrett, 2 Watts, 327; Hendricks v. Johnson, 6 Port. [Ala.] 472; Webster v. Fleming, 2 Humph. 518; Evans v. Merriweather, 4 Ill. 492; see Creighton v. Kaweah Canal Co., 67 Cal. 221; Miller v. Lapham, 46 Vt. 525, and cases *supra*. A mill-owner has a cause of action against one who, by piling logs on the ice above the mill, when the stream is frozen over, interrupts the natural flow of the stream to the mill (Wooden v. Mt. Pleasant Lumber, etc. Co., 106 Mich. 412; 64 N. W. 329).

¹⁰ Ware v. Allen, 140 Mass. 513; Smith v. Rochester, 38 Hun, 612.

¹¹ Johnstown Cheese Mfg. Co. v. Veghte, 69 N. Y. 16.

¹² The exclusive enjoyment of water in a particular way for twenty years or more, without interruption, is sufficient to raise a presumption of a grant to use it in that manner (Belknap v. Trimble, 3 Paige, 577). A party cannot, within the twenty years, enlarge the use, and at the end of that time claim the enlarged use (Prentice v. Geiger, 74 N. Y. 341). The mere occupation for a time, not sufficient to raise the presumption of a grant, does not give an exclusive right to the use of the water (Platt v. Johnson, 15 Johns. 213). And the mere omission by one proprietor to make use of a right which belongs to him, however long continued, will not prejudice him or confer any right upon the adjoining proprietors (Townsend v. McDonald, 12 N. Y. 381). A prescriptive right in navigable waters cannot be acquired as against the public (Hoboken Land, etc. Co. v. Hoboken, 36 N. J. Law, 540); nor against the United States (Wilkins v. McCue, 46 Cal. 656). In Michigan, fifteen years' user of a dam so as to flow the land of another, without complaint from the latter, gives a prescriptive right of flowage in the land (Williams v. Barber, 104 Mich. 31; 62 N. W. 155). In Mississippi, ten years' user is sufficient (Alcorn v. Sadler, 71 Miss. 634; 14 So. 444).

unless they amount to a nuisance, or he does something equivalent to a ratification of the act which caused them to exist.² He is not a guarantor of the safe condition of the premises which he occupies; nor is he chargeable with the duty of constant inspection and extreme care, but is held only to reasonable care. His covenant with the lessor to repair does not inure to the benefit of a stranger.³

§ 713. **Tenant, when liable.** — After becoming aware of a defect in the thing hired, the tenant or hirer must use such increased care as the defective nature of the thing requires, and cannot excuse himself for the want of such care by the plea that he was not responsible for the defect itself. Thus, if a house should be let with a defective faucet, a tenant would not be liable for the defect; but if he used the faucet in the same manner as if it were perfect, while knowing that it was not, he would be answerable for the consequences.¹ And if, by his own negligence, he makes the property an occasion of injury to others, he cannot avail himself, as a defense, of a covenant on the part of the landlord, or of any other person, to repair the defects caused by his fault.² As

from month to month is not liable for damages to adjoining property caused by the percolation of foul waters from a vault in consequence of the decay of vault material (*Griffith v. Lewis*, 17 Mo. App. 605). As to wharfingers, see § 725, *post*.

² Thus, where an excavation had been made in the highway fronting a house, before it was leased to defendant, and he used such excavation as a means of access to the house, held sufficient to justify a finding that he had adopted the act of the landlord in making the excavation, and was liable for its defects (*Davenport v. Ruckman*, 10 Bosw. 30, 37). So both landlord and tenant are responsible to passers-by for defects in an area or other opening in the highway (*Ib.*; *Irvine v. Wood*, 51 N. Y. 224; *Durant v. Palmer*, 5 Dutch. 544; *Buesching v. St. Louis Gas Co.*, 73 Mo. 219).

³ Where a window-sash fell upon a passer-by, the tenant held not liable, though bound by the lease to make repairs, and an expert discovered the defect by an examination after the accident (*Odell v. Solomon*, 99 N. Y. 635). See note 9, § 709, *ante*.

¹ See *White v. Montgomery*, 58 Ga. 204; *Kaiser v. Hirth*, 36 N. Y. Superior, 344; *Marshall v. Cohen*, 44 Ga. 489; *Knauss v. Brua*, 107 Pa. St. 85; *Cook v. Montagu*, 26 L. T. N. S. 471 [three cases of bad water-closets].

² See *Picard v. Smith*, 10 C. B. N. S. 470; *Boston v. Gray*, 144 Mass. 53; *Caldwell v. Slade*, 156 Id. 84; 30 N. E. 87; *Schindlebeck v. Moon*, 32 Ohio St. 264. Where a driveway from a lumber shed to the carriage-way was an appurtenance belonging exclusively to the shed and the land on which it stood, it was the duty of

sufficient water with which to work his mill.³ But if the proprietor of a mill shuts down his gates and detains the water for an unreasonable time, or lets it out in such quantities as to prevent the owner of the mill below from using it, or deprives him of a reasonable and fair participation in the benefits of the stream, he will be liable for damages.⁴

§ 731. **Overflowing banks of streams.** — The proprietor of a dam is liable for the consequences of the percolation of water through the natural soil, under the embankment, upon an adjacent owner's land, notwithstanding the use of all usual care upon his part in the construction of the dam.¹ And he has no right to build a dam of such a height as will necessarily cause the water to set back upon a mill higher up the stream, or to overflow the natural banks of the stream. If he does so, he is liable,² without proof of special damage. The law will

³ *Palmer v. Mulligan*, 3 Caines, 307; *Platt v. Johnson*, 15 Johns. 213; *Thompson v. Crocker*, 9 Pick. 59; and see *Boynton v. Rees*, Id. 528; *Hayes v. Waldron*, 44 N. H. 584; *Davis v. Getchell*, 50 Me. 602; *Embrey v. Owen*, 6 Exch. 353.

⁴ *Merritt v. Brinkeroff*, 17 Johns. 306; *Hetrich v. Deachler*, 6 Pa. St. 32; *Pratt v. Lamson*, 2 Allen, 288; *Bliss v. Rice*, 17 Pick. 23. A dam will not be interfered with because it, to some extent, delays the water in reaching a lower mill (*Robertson v. Miller*, 40 Conn. 40; *Hoy v. Sterrett*, 2 Watts, 327; *Hartzall v. Sill*, 12 Pa. St. 248).

¹ *Pixley v. Clark*, 35 N. Y. 520; *Crittenden v. Wilson*, 5 Cow. 165; see *Savannah, etc. Canal Co. v. Bourquin*, 51 Ga. 378; and cases in note 3, § 728, *ante*.

² *Munroe v. Gates*, 48 Me. 463; *Heath v. Williams*, 25 Id. 209; *Great Falls Co. v. Worster*, 15 N. H. 460; *Odiorne v. Lyford*, 9 Id. 502; *Hazard v. Robinson*, 3 Mason, 272; *Hutchinson v. Granger*, 13 Vt. 386; *Johns v. Stevens*, 3 Id. 308; *Stout*

v. McAdams, 2 Scam. 67; *Brown v. Bowen*, 30 N. Y. 519; *Stiles v. Hooker*, 7 Cow. 266; see *Baldwin v. Calkins*, 10 Wend. 167; *Russell v. Scott*, 9 Cow. 279; *Dyer v. Depui*, 5 Whart. 584; *Cowles v. Kidder*, 24 N. H. 364; *Saunders v. Newmnan*, 1 Barn. & Ald. 258. A canal company which constructs a dam across a natural stream, and discharges the water thus detained in larger amounts than the stream will carry, causing the same to overflow the land, is liable for the injuries caused, though the dam was authorized and the same was constructed and maintained in a proper manner (*McKee v. Delaware, etc. Canal Co.*, 52 Hun, 52; 4 N. Y. Supp. 753; *aff'd*, 125 N. Y. 353; 26 N. E. 305). *s. p.*, *Athens Mfg. Co. v. Rucker* 80 Ga. 291; 4 S. E. 885; *Irwin v. Richardson*, 88 Wisc. 429; 60 N. W. 786. A railroad company having the right to bridge a stream must have regard to the safety of its bridge for trains, and also to its capacity for permitting the unobstructed flow of ice and water. Neither consideration must

presume damages.³ Though one has a right to erect a mill where he pleases on his own land, yet, if he erects a dam so near an existing dam, that the dam before erected causes the water to flow back on his mill and obstruct its movement, he cannot complain.⁴

§ 732. Care in construction and maintenance of dams. —

If a dam is not built upon a proper model or of good material, or is not braced sufficiently to withstand freshets of ordinary occurrence,¹ by reason of which it breaks away and causes

be sacrificed to the other (*McCleneghan v. Omaha, etc. R. Co.*, 25 Neb. 523; 41 N. W. 350). *s. p.*, *Omaha, etc. R. Co. v. Brown*, 29 Neb. 492; 46 N. W. 39 [overflow of river caused by negligent construction of bridge]; see *Little Rock, etc. R. Co. v. Chapman*, 39 Ark. 463; *Union Trust Co. v. Cuppy*, 26 Kans. 754; *Sherlock v. Louisville, etc. R. Co.*, 115 Ind., 22; 17 N. E. 171; *Noe v. Chicago, etc. R. Co.*, 76 Iowa, 360; 41 N. W. 42; *Taylor v. Baltimore, etc. R. Co.*, 33 W. Va. 39; 10 S. E. 29. The mere fact that a railroad embankment was constructed on the land of the company does not limit its liability for interrupting the flow of surface water to such interruption alone as may result from negligence in the construction of the embankment (*Mundy v. N. Y., Lake Erie, etc. R. Co.*, 75 Hun, 479; 27 N. Y. Supp. 469). See *Drake v. N. Y., Lackawanna, etc. R. Co.*, 75 Hun, 422; 27 N. Y. Supp. 739; *Hodge v. Lehigh Val. R. Co.*, 39 Fed. 449. The right to float logs down a stream does not confer a right to run them upon the adjacent land, nor to cause the water to overflow the banks to the injury of the shore-owner; and it is immaterial whether an injury so occurring arises from the neglect of the party or otherwise (*Haines v. Welch*, 14 Oreg. 319). Compare *White River Log Co. v. Nelson* (45

Mich. 578), where a boom company was held for damages caused by a jam of logs, and consequent overflow, with *Borchardt v. Wausau Boom Co.* (54 Wisc. 107), where the company was held not liable, because the damage would not have occurred but for an extraordinary freshet, which could not have been anticipated. In *Anderson v. Thunder Bay Boom Co.* (61 Mich. 489; 28 N. W. 518), held, in an action against a boom company for damage to plaintiff's land, that it was for defendant to show the actual condition of the logs, and of the water, and what was done to move the logs, and prevent the overflow; and that it was for the jury to determine whether there were unnecessary jams causing the flowage.

³ *Woodman v. Tufts*, 9 N. H. 88. As to measure of damage, see *Anon.*, 4 Dall. 147; *s. c.*, as *Walker v. Butz*, 1 Yeates, 574; *Hatch v. Dwight*, 17 Mass. 289; *Polly v. McCall*, 37 Ala. 20; *Read v. Barker*, 1 Vroom, 378; *Sutliff v. Johnson*, 17 Neb. 575; *Brown v. Chicago, etc. R. Co.*, 80 Mo. 457.

⁴ *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282.

¹ Defendant's dam succumbed to the pressure of a severe rain-storm, because improperly constructed; the accumulated water first tore away plaintiff's dam and then another dam

injury to others, the owner is liable. No more, however, than ordinary care in its construction and maintenance is required. If, notwithstanding the exercise of such care in building, the water undermines its foundations, carrying away the whole structure and injuring dams or other property lower down the stream, the owner is not liable.² If a dam is so improperly constructed as to cause ice to accumulate, and on the ice breaking up in the spring, the fields adjoining the dam are injured, it is a nuisance; and the proprietor is liable in damages for special injuries caused by such accumulations of ice.³ All waste-gates must be kept free for the passage of water; and it is no excuse for suffering the gates to become choked with refuse, that this would not have happened but for deposits of dirt improperly made by others in and near the upper part of the stream.⁴

§ 733. Diversion of water-course. — It is a general principle that any person who, without authority, diverts the whole or any part¹ of the water of a stream from its natural course, or interferes with its natural current, is responsible, absolutely, irrespective of negligence or special damage,² to any one who

of which plaintiff was assignee. Held, that defendant might be liable for the injury to both dams (Pollett v. Long, 56 N. Y. 200; Rich v. Keshena Improvement Co., 56 Wisc. 287). It is not enough that the dam was sufficient to resist ordinary floods, if the stream was subject to great freshets. The latter likewise should have been guarded against (Bailey v. New York, 3 Hill, 581); although they may be years apart and at no regular intervals (Gray v. Harris, 107 Mass. 492). It is sufficient to allege that the dam broke because of defective construction or mismanagement (Hoffman v. Tuolumne Co. Water Co., 10 Cal. 417).

² Nichols v. Marshland, L. R. 2 Ex. Div. 1; L. R. 10 Ex. 255; Livingston v. Adams, 8 Cow. 175; Everett v. Hydraulic, etc. Co., 23 Cal. 225; Pixley v. Clark, 32 Barb. 268; rev'd, 35 N. Y. 520.

³ Bell v. McClintock, 9 Watts, 119; see Cowles v. Kidder, 24 N. H. 364; but see Smith v. Agawam Canal Co., 2 Allen, 355.

⁴ Schuylkill Navigation Co. v. McDonough, 33 Pa. St. 73. As to proof of ownership of dam, see Darling v. Thompson, [Mich.], 65 N. W. 754.

¹ A person through whose farm a stream naturally flows, is entitled to have the *whole* pass through it, though he may not require the whole or any part of it for the use of machinery (Crooker v. Bragg, 10 Wend. 260). See Webb v. Portland Mfg. Co., 3 Sumner, 189; Peregoy v. Sellick, 79 Cal. 568; 21 Pac. 966; and cases cited in note 8, § 729, *ante*.

² Butman v. Hussey, 12 Me. 407; Plumleigh v. Dawson, 1 Gilm. 544; Stein v. Burden, 24 Ala. 130; Hendrick v. Cook, 4 Ga. 241; Chapel v. Smith, 80 Mich. 100; 45 N. W. 69; see Mason v. Hill, 3 Barn. & Ad.

is entitled to have the water flow in its natural state.³ It is no excuse for such diversion that the stream, notwithstanding its diversion, might still be made valuable for water-power,⁴ or that the other riparian owners would not have been damaged if they had continued to use the water as they formerly had done,⁵ or that there is still water enough left to supply the mills lower down on the stream;⁶ but it is a good defense that the stream required labor to keep it open, and was, therefore, not wholly natural, and was subject to diversion from natural causes.⁷ No one of several persons whose wells tap the same subterranean stream can make an artificial use of the water there-

304; 5 Id. 1; *Blanchard v. Baker*, 8 Greenl. 253. Plaintiff may recover nominal damages of "no appreciable amount" (*Chapman v. Copeland*, 55 Miss. 476).

³ *Bellinger v. N. Y. Central R. Co.*, 23 N. Y. 42; *Parker v. Griswold*, 17 Conn. 299; *Pratt v. Lamson*, 2 Allen, 275; *Dayton v. Rutherford*, 128 Ill. 271; 21 N. E. 198; *Robinson v. Shanks*, 118 Ind. 125; 20 N. E. 713; see *Curtiss v. Ayrault*, 47 N. Y. 73. But one who has an authority, constitutionally granted by the legislature, to interfere with a running stream of water, is liable for the consequences of the *negligent* manner of such interference only, and not absolutely (*Bellinger v. N. Y. Central R. Co.*, *supra*; *Blood v. Nashua, etc. R. Co.*, 2 Gray, 137). See *White v. South Shore R. Co.*, 6 Cush. 412; *Hooker v. New Haven, etc. Co.*, 15 Conn. 312; *Denslow v. The Same*, 16 Id. 98. The fact that the work is done for a municipal corporation and on its land is no defense (*Covert v. Valentine*, 66 Hun, 632; 21 N. Y. Supp. 219; *Kansas City v. Slangstrom*, 53 Kans. 431; 36 Pac. 706). It is trespass for a railroad company to unnecessarily divert the course of a natural stream in the construction of its road (*Fleming v. Wilmington, etc. R. Co.*, 115

N. C. 676; 20 S. E. 714; *Missouri Pac. R. Co. v. Keyes*, 55 Kans. 205; 40 Pac. 275; *East St. Louis, etc. R. Co. v. Eisentraut*, 134 Ill. 96; 24 N. E. 760). So it is a nuisance to obstruct a water course by a bridge and embankment, and negligence in the construction need not be alleged (*Orvis v. Elmira, etc. R. Co.*, 17 N. Y. App. Div. 187; 45 N. Y. Supp. 367; *Mundy v. N. Y., Lake Erie, etc. R. Co.*, 75 Hun, 479; 27 N. Y. Supp. 469). Other railroad cases are cited under § 407, *ante*. An artificial rivulet, created by the drainage and pumping of a colliery may be diverted before it flows into the natural stream, and the proprietor on the banks of the natural stream will have no right of action for the diversion of the water (*Wood v. Waud*, 3 Ex. 779). But where the water of a spring is diverted and exhausted before reaching its natural channel, the rule stated in the text applies (*Colrick v. Swinburne*, 105 N. Y. 503; 12 N. E. 427; *Fleming v. Davis*, 37 Tex. 173).

⁴ *Plumleigh v. Dawson*, 1 Gilm. 544.

⁵ *King v. Tiffany*, 9 Conn. 162.

⁶ *Crooker v. Bragg*, 10 Wend. 260.

⁷ *Duncan v. Bancroft*, 110 Mass. 267.

from, so as at any time to entirely deprive the others of the ability to make such a use of it.⁸

§ 734. Fouling of streams and wells.—Any use of the land near a stream, or of the water of the stream itself, which renders the water unwholesome, offensive, or unfit for the purposes for which it is used is unlawful; and any riparian owner has an action for damages against the author of such a wrong.¹ Thus, one who sinks a cess-pool in the ground,² or deposits manure or other noxious substances³ so near the water as to

⁸ *Willis v. Perry*, 92 Iowa, 297; 60 N. W. 727. *s. P.*, *Hilliker v. Coleman*, 73 Mich. 170; 41 N. W. 219; *Castalia Trout Club Co. v. Castalia Sporting Club*, 8 Ohio C. C. 194 [injunction]; *Williams v. Ladew*, 161 Pa. St. 283; 29 Atl. 54 [same]. See *Meyer v. Tacoma Water Co.*, 8 Wash. St. 144; 35 Pac. 601 [underground flow when not protected].

¹ Where several manufacturers having their works upon a stream, cause a nuisance to a riparian owner by discharging offensive matter into the stream, it is no answer to an action against one of them that the share he contributed to the nuisance is infinitesimal and unappreciable. The riparian owner is entitled to have the water in a pure condition, and has a right to take the manufacturers, one by one, and prevent each from discharging his contribution to that which becomes in the aggregate a nuisance (*Thorpe v. Brumfitt*, L. R. 8 Ch. 650; followed, *Blair v. Deakin*, 57 L. T. 522). There is no public policy in favor of industrial development which will justify the erection and operation of a factory that pollutes the stream, provided the most modern appliances are used to prevent it (*Indianapolis Water Co. v. American Strawboard Co.*, 57 Fed. 1000). One who, in drilling for natural gas, with full knowledge of the geological forma-

tion, neglects to exercise reasonable care to avoid the destruction of wells of fresh water in the neighborhood, by the mingling of salt water with the fresh streams, which is plainly to be anticipated, but may be avoided by reasonable precautions, is liable for the destruction of a well caused by such negligence (*Collins v. Chartiers Valley Gas Co.*, 139 Pa. St. 111; 21 Atl. 147).

² *Call v. Buttrick*, 4 Cush. 345; *Norton v. Scholefield*, 9 Mees. & W. 665.

³ *Woodward v. Aborn*, 35 Me. 271; *Brown v. Illius*, 27 Conn. 84; *Chapman v. Rochester*, 110 N. Y. 278; 18 N. E. 88; *Edmonson v. Moberley*, 98 Mo. 533; 11 S. W. 990; *Maguire v. Cartersville*, 76 Ga. 84. As to liability of cities for discharging sewage on private lands or into streams, see § 274, *ante*. It has been held illegal to erect a tan-yard upon a stream, if its effect is to render the water unwholesome (*Howell v. McCoy*, 3 Rawle, 256). And see *Crossley v. Lightowler*, L. R. 3 Eq. 279. It is clearly illegal for the owner of a tannery to throw tan-bark into a stream so as to foul the water or otherwise damage the proprietors lower down the stream (*Honsee v. Hammond*, 39 Barb. 89); or for one to turn sewage into his own well, so that, by percolation, it passes into his neighbor's well (*Ballard v. Tom-*

corrupt it, is liable to any one who has a right to have the water flow in its natural state of purity, even though the latter may also have polluted it.⁴ It is immaterial whether the nox-

linson, L. R. 29 Ch. Div. 115). See *Merrifield v. Worcester*, 110 Mass. 216. The appropriator of a stream for mining purposes must use it so as not to injure orchards and gardens along the stream, which were enclosed and planted before the water was appropriated (*Wixon v. Bear River, etc. Co.*, 24 Cal. 367). s. p., *Brooke v. Winters*, 39 Md. 505 [washing ores]; *Elder v. Lykens Val. Coal Co.*, 157 Pa. St. 490; 27 Atl. 545 [same]; *Drake v. Lady Ensley Coal Co.*, 102 Ala. 501; 14 So. 749 [same]; *Satterfield v. Rowan*, 83 Ga. 187; 9 S. E. 677 [same]; *Prentice v. Geiger*, 74 N. Y. 341 [discharging sawdust into stream]; *People v. Elk River Mill, etc. Co.*, 107 Cal. 214; 40 Pac. 486 [maintaining stable and hog-pen]; *Barnard v. Shirley*, 135 Ind. 547; 34 N. E. 600 [bathing establishment; no recovery]. It is a material question whether defendant's use of the stream was reasonable (*Townsend v. Bell*, 70 Hun. 557; 24 N. Y. Supp. 193). One who pollutes a stream flowing into a fish-pond is liable for injury to the fish (*Smith v. Cranford*, 84 Hun. 318; 32 N. Y. Supp. 375). Nothing but a user for a sufficient time will justify the turning of water impregnated with metallic substances or dye-stuffs into a water-course (*Wright v. Williams*, 1 Mees. & W. 77; see *Crossley v. Lightowler*, L. R. 3 Eq. 279; 2 Ch. App. 178). But the right may be acquired by adverse user for twenty years (*Merrifield v. Lombard*, 13 Allen, 16; *Jones v. Crow*, 32 Pa. St. 398; *Hayes v. Waldron*, 44 N. H. 585; *Murgatroyd v. Robinson*, 7 El. & Bl. 391); but fifteen years' user not enough (*Middlesex Co. v. Lowell*, 149 Mass. 509; 21 N. E. 872). For other illustrations of the rule, see *Moore & Webb*, 1 C. B. N. S. 673; *Carlyon v. Lovering*, 1 Hurlst. & N. 784; *Magor v. Chadwick*, 11 Ad. & El. 571; *Rawstron v. Taylor*, 11 Exch. 380; *Baxendale v. McMurray*, L. R. 2 Ch. App. 790; *Stockport Waterworks Co. v. Potter*, 7 Hurlst. & N. 160; *Stonehewer v. Farrar*, 6 Q. B. 730; *Hodgkinson v. Ennor*, 4 Best & S. 229; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Snow v. Parsons*, 28 Vt. 459; *Wheatley v. Chrisman*, 24 Pa. St. 298; *Lewis v. Stein*, 16 Ala. 214; *Mississippi Mills Co. v. Smith*, 69 Miss. 299; 11 So. 26. Plaintiff is not estopped by acquiescence in a city's system of sewerage; not having encouraged the system, or by word or deed induced the city authorities to direct the sewers so that the flow would reach his premises (*Chapman v. Rochester*, 110 N. Y. 273; 18 N. E. 88).

⁴*Jackman v. Mills*, 137 Mass. 277. If the injury resulting from defendant's pollution can be specified, it is no defense that plaintiff has also polluted the water (*Sherman v. Fall River Iron Works Co.*, 5 Allen, 213); or failed to take measures to prevent the injury (*Tennessee Coal, etc. Co. v. Hamilton*, 100 Ala. 252; 14 So. 167); for in such cases there is no question of negligence or of contributory negligence (*Brown v. Dean*, 123 Mass. 254; *Clarke v. French*, 122 Id. 419). But compare *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 576; 42 N. W. 448. In *Ballard v. Tomlinson* (L. R. 26 Ch. Div. 194), plaintiff and defendant were owners of

ious substances are carried on the surface of the ground, or have soaked into the soil and are carried along under the surface by means of water diffusing itself according to natural laws.⁵ But it has been held that where such noxious substances, by penetrating or being buried in the soil, affected subterraneous currents by which the well was supplied, and corrupted the water only in that mode, the party placing such substances on or within his soil was not liable, in the absence of malice.⁶

§ 735. Drainage of surface water.—At common law, every land-owner has a right, for the purpose of securing or protecting the reasonable use and enjoyment of his premises, to prevent the overflow of surface water on his land, from that adjoining, by raising embankments or other barriers, on his own land, or by diverting it by ditches or other means, without incurring liability to an adjacent owner whose land receives such diverted water.¹ He is not limited to the drainage of

adjoining lots, on which each had a well. Defendant polluted the water of his own well, and plaintiff, by continual pumping of his own well, exhausted the water around it, so that the polluted water of defendant's well flowed into and fouled plaintiff's well. Held, defendant had the right to use the water in his own well as he saw fit, so long as water was in it. Its leaving the well was no fault of his, but plaintiff's own act, and he could not recover.

⁵Brown v. Illius, 27 Conn. 84; Good v. Altoona, 162 Pa. St. 493; 29 Atl. 741; Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897; 60 N. W. 373; Kinnaird v. Standard Oil Co., 89 Ky. 468; 12 S. W. 937.

⁶Brown v. Illius, 27 Conn. 84; Dillon v. Acme Oil Co., 49 Hun, 565; 2 N. Y. Supp. 289 [injunction refused].

¹Chadeayne v. Robinson, 55 Conn. 345; 11 Atl. 592; Barkley v. Wilcox, 86 N. Y. 140; Horton v. Sullivan, 97 Mich. 282; 56 N.

W. 552; Jones v. Robertson, 116 Ill. 523; Benthall v. Seifert, 77 Ind. 302; Jean v. Pennsylvania Co., 9 Ind. App. 56; 36 N. E. 159; Lessard v. Stram, 62 Wisc. 112; Johnson v. Chicago, etc. R. Co., 80 Id. 641; 50 N. W. 771; Rowe v. St. Paul, etc. R. Co., 41 Minn. 384; 43 N. W. 76; Jordan v. St. Paul, etc. R. Co., 42 Minn. 172; 43 N. W. 849; Bunderson v. Burlington, etc. R. Co., 43 Neb. 545; 61 N. W. 721; Lincoln, etc. R. Co. v. Sutherland, 44 Neb. 526; 62 N. W. 859; Beatrice v. Leary, 45 Neb. 149; 63 N. W. 370; Gray v. Schriber, 58 Mo. App. 173; Drew v. Hicks, Cal. ; 35 Pac. 563; Cass v. Dicks, 14 Wash. St. 75; 44 Pac. 113; Livezey v. Schmidt, 96 Ky. 441; 29 S. W. 25; Jenkins v. Wilmington, etc. R. Co., 110 N. C. 438; 15 S. E. 193; Fleming v. Wilmington, etc. R. Co., 115 N. C. 676; 20 S. E. 114; Edwards v. Charlotte, etc. R. Co., 39 S. C. 472; 18 S. E. 58; Felt v. Vicksburg, etc. R. Co., 46 La. Ann. 549; 15 So. 177. See also, Murphy v.

such water into a stream in the precise manner in which it was discharged when the land was in a state of nature; he may change the direction, accelerate and increase the volume of water which reaches the stream in any reasonable manner, provided he do not overtax its natural capacity.² But this right is subject to the limitation that such protective structures shall not have the effect of collecting surface water into a body and eventually casting it upon lower land, which but for such structure would not have reached it,³ or casting it into a stream

Kelly, 68 Me. 521; Swett v. Cutts, 50 N. H. 439; Parks v. Newburyport, 10 Gray, 28; Dickinson v. Worcester, 7 Allen, 19; Cassidy v. Old Colony R. Co., 141 Mass. 174; Bowsley v. Speer, 2 Vroom, 351; Martin v. Riddle, 26 Pa. St. 415; Sentman v. Baltimore, etc. R. Co., 78 Md. 222; 27 Atl. 1074; Delahoussaye v. Judice, 13 La. Ann. 587; Nininger v. Norwood, 72 Ala. 277; Ogburn v. Connor, 46 Cal. 346; Gormley v. Sanford, 52 Ill. 158; Butler v. Peck, 16 Ohio St. 334; Laumier v. Francis, 23 Mo. 181. In Michigan, it is held that a rural land-owner has no right to put up an artificial barrier which will flood his neighbor's land, for the mere purpose of reclaiming the bed of a pond that has always been on his premises (Boyd v. Conklin, 54 Mich. 583). A land-owner has no right, by digging ditches or tiling drains, to empty out the sag-holes into a ravine upon the land of an adjacent proprietor; and equity will interfere by injunction to restrain him (Gregory v. Bush, 64 Mich. 37; 31 N. W. 90). s. p., Yerex v. Eineder, 86 Mich. 24; 48 N. W. 875; Leidlein v. Meyer, 95 Mich. 586; 55 N. W. 367.

²Peck v. Goodberlett, 109 N. Y. 180; 16 N. E. 350; Goodale v. Tuttle, 29 N. Y. 459; McCormick v. Horan, 81 Id. 86;

Waffle v. N. Y. Central R. Co., 53 Id. 11; Noonan v. Albany, 79 Id. 470; Ellis v. Duncan, 21 Barb. 230; Delhi v. Youmans, 50 Id. 316; Miller v. Laubach, 47 Pa. St. 154; Meixell v. Morgan, 149 Id. 415; 24 Atl. 216; Wheeler v. Worcester, 10 Allen, 591; White v. Chapin, 12 Id. 516; Parks v. Newburyport, 10 Gray, 28; Luther v. Winnisimmet Co., 9 Cush. 171; Buffum v. Harris, 5 R. I. 253; Johnson v. Jordan, 2 Metc. 234; Nichol v. Canada Southern R. Co., 40 U. C. [Q. B.], 583; Abbott v. Kansas City, etc. R. Co., 83 Mo. 271; Jones v. St. Louis, etc. R. Co., 84 Id. 151; Jones v. Wabash, etc. R. Co., 18 Mo. App. 251; Treat v. Bates, 27 Mich. 390; Sheehan v. Flynn, 59 Minn. 436; 61 N. W. 462; Olson v. St. Paul, etc. R. Co., 38 Minn. 479; 38 N. W. 490; Dorr v. Simerson, 73 Iowa, 89; 34 N. W. 752; McCormick v. Winters, 94 Iowa, 82; 62 N. W. 655; Cheeves v. Danielly, 80 Ga. 114; 4 S. E. 902.

³Torrey v. Scranton, 133 Pa. St. 173; 19 Atl. 351; Lucot v. Rodgers, 159 Pa. St. 58; 28 Atl. 242; Weddell v. Hapner, 124 Ind. 315. Jones v. Robertson, 116 Ill. 523; Knight v. Brown, 25 W. Va. 808; Horton v. Sullivan, 97 Mich. 282; 56 N. W. 552; Paddock v. Somes, 102 Mo. 226; 14 S. W. 746; Stinson v. Fishel, 93 Iowa, 656; 61 N. W. 1063.

so as to cause it to overflow and flood lower land.⁴ Nor has he a right, to the injury of lower owners, to turn into a natural stream the water of another stream,⁵ or of an artificial collection of surface water,⁶ which would not naturally flow into it; and he is liable for the damages caused by his doing so.⁷ He is of course liable for interfering with, or obstructing the private drains of another proprietor.⁸

§ 736. Interference with water. — No one is liable for the

⁴Noonan v. Albany, 79 N. Y. 470; Williamson v. Oleson, 91 Iowa, 290; 59 N. W. 267.

⁵Tillotson v. Smith, 32 N. H. 90. In Baltimore v. Appold (42 Md. 442), the attempt to empty into a small stream 10,000,000 gallons of water daily was held to be inconsistent with the rights of the lower riparian owners.

⁶In Brayton v. Fall River (113 Mass. 218), defendant was held liable for draining the surface water of seventy-five acres into a creek, and by the sediment thereof filling up plaintiff's wharf, where only twenty acres naturally drained into the creek.

⁷In the following cases railroad companies were held liable for collecting surface water by an embankment, and causing it to flow on plaintiff's land instead of elsewhere, as it otherwise would have done; Savannah, etc. R. v. Buford, 106 Ala. 303; 17 So. 395; Little Rock, etc. R. Co. v. Chapman, 39 Ark. 463; Gilbert v. Savannah, etc. R. Co., 69 Ga. 396; Staton v. Norfolk, etc. R. Co., 199 N. C. 337; 13 S. E. 933; Cairo, etc. R. Co. v. Stevens, 73 Ind. 278; Ohio, etc. R. Co. v. Wachter, 123 Ill. 440; 15 N. E. 279; Weidekin v. Snelson, 17 Ill. App. 461; Benson v. Chicago, etc. R. Co., 78 Mo. 504; Hogenson v. St. Paul, etc. R. Co., 31 Minn. 224; O'Connor v. Fond du Lac, etc. R. Co., 52 Wisc. 526; Union Pac. R. Co.

v. Dyche, 31 Kans. 120; Fremont, etc. R. Co. v. Marley, 25 Neb. 138; 40 N. W. 948; Lincoln, etc. R. Co. v. Sutherland, 44 Neb. 526; 62 N. W. 859; Gulf, etc. R. Co. v. Donahoo, 59 Tex. 129; Gulf, etc. R. Co. v. Helsley, 62 Id. 593; Louisville, etc. R. Co. v. Hays, 11 Lea, 382; Illinois Cent. R. Co. v. Miller, 68 Miss. 760; 10 So. 61; Sinai v. Louisville, etc. R. Co., 71 Miss. 547; 14 So. 87; Bourdier v. Morgan's, etc. R. Co., 35 La. Ann. 947; Delaware, etc. Canal Co. v. Goldstein, 125 Pa. St. 246; 17 Atl. 442; Philadelphia, etc. R. Co. v. Davis, 68 Md. 281; 11 Atl. 822; Henry v. Ohio River R. Co., 40 W. Va. 234; 21 S. E. 863. See Louisville, etc. R. Co. v. Hodge, 6 Bush, 141; Johnson v. Atlantic, etc. R. Co., 35 N. H. 569.

⁸Thus, where a ditch drained the lands of two proprietors respectively, and the lower owner, by building a dam, set the water back upon the upper land, destroying the crops thereon, he was held liable in damages (Shaw v. Etheridge, 7 Jones Law, 225). s. p., Williams v. Gale, 3 Harr. & J. 231; McCormick v. Horan, 81 N. Y. 86; Patneaud v. Claire, 32 Ill. App. 554; Willey v. Norfolk R. Co., 98 N. C. 263; 3 S. E. 485; Osten v. Jerome, 93 Mich. 196; 53 N. W. 7; Vannest v. Fleming, 79 Iowa, 638; 44 N. W. 906; Wharton v. Stevens, 84 Iowa, 107; 50 N. W. 562.

action of water with which he has in no way interfered. Whether it runs in a stream or settles in a bog, whether it has always taken the same course, or has changed it, is of no importance, so long as the owner or occupant of the land has not, directly or indirectly altered its natural flow.¹ On the other hand, one who wrongfully removes a barrier to the flow of water from his land upon his neighbor's, cannot escape liability for the consequences by any degree of subsequent care.² For, in taking away the barriers provided by nature, he becomes absolutely responsible for the action of the water—as much so as if it were a living creature which he had ordered to do what it does; and his best efforts to stay the progress of the evil will not in the least excuse him for having originally set it in motion, any more than a wound inflicted

¹See *Thomas v. Kenyon*, 1 Daly, 132, per Daly, J. In *Wilson v. Waddell* (L. R. 2 App. Cas. 95), defendant was held not liable for a rainfall which flowed from his mine into plaintiff's, as the result of gravitation and percolation, though the working of the mine caused cracks and fissures and subsidence of the surface. But where an upper landowner, by drilling a well and pumping, increases the aggregate quantity of water discharged, and changes its character from fresh to salt, whereby it becomes more injurious to the lower land, he is liable to the owner of the latter for such injuries, unless he could not prevent the injury by reasonable care and expenditure, though such water is discharged in the lawful use of his land (*Pfeiffer v. Brown*, 165 Pa. St. 267; 30 Atl. 844).

²Defendant wrongfully removed a natural barrier to the flow of water from his land upon plaintiff's land. Held, he was bound to make another barrier equally adequate for the purpose, and liable, in default thereof,

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for all the damage done by such everflow (*Firmstone v. Wheeley*, 13 L. J. [Exch.], 361; 2 Dowl. & L. 203). Defendants, the owners of a mine adjoining that of plaintiff's, removed water from one portion of their mine to another, knowing that the water in consequence would percolate (as it did) into plaintiff's mine. If the water had not been removed by the defendants, it would not have entered the plaintiff's mine. Held, that as the course which the water took was owing to the active interference of defendants, they were responsible (*Baird v. Williamson*, 15 C. B. N. S. 376). See *Bagnall v. Northwestern R. Co.*, 1 Hurlst. & C. 544; aff'g, 7 Hurlst. & N. 423. Where defendant, in working his coal mine, removed the "ribs" of coal which supported the roof, so that water from the surface flowed into his mine, and from thence into plaintiff's adjoining mine; he was held liable for the damage done, although no negligence was shown (*Homer v. Watson*, 79 Pa. St. 242).

upon the person of another would be excused by the best exertions of the guilty party to heal it.³

§ 737. Obstruction of navigation. — Navigable streams are public highways, in the sense that every person has a right to travel upon them.¹ Any interference with, or obstruction of, a navigable stream, which is calculated to impede travel upon it, is a public nuisance, punishable by public prosecution. Thus, it is a public nuisance to build a bridge,² or a dam,³ upon a navigable stream, without legislative authority; and, although built under such an authority, it will still be a nuisance, if it is not built so as to do as little injury as possible to the navigation.⁴

³In *Grant v. Kuglar* (81 Ga. 637; 8 S. E. 878), a stream flowed through two adjoining tracts of land, the property of different owners, and in the bed of the stream on the upper tract a natural ledge of rock retarded the flow so as to protect the lower tract from overflow. Held, the proprietor of the upper tract was liable for the overflow of the lower tract caused by his removing the ledge.

¹See § 333, *ante*, and cases cited. The navigable capacity of a river, rather than the frequency of its use for navigation, determines its character as a highway (*Hickok v. Hine*, 23 Ohio St. 523). Where a stream is above tide-water, the burden is on one asserting its navigability to aver and prove it (*Morrison v. Coleman*, 87 Ala. 655; 6 So. 374). *Floatable streams*, though the private property of the riparian owners, are subject to the public use as highways for the transportation of timber and other products of land to mill or market; and a right to the exclusive use of such a stream, as against such public use, cannot be acquired by a riparian owner by the maintenance of a dam across the stream for the period of prescription (*Gas-*

ton v. Mace, 33 W. Va. 14; 10 S. E. 60). A stream which has floatable capacity at periods recurring with regularity, and continuing a sufficient length of time to make it useful for floating logs, is navigable; but it must be capable of such floatage as is of practical utility and benefit to the public as a highway for trade and commerce (*Haines v. Hall*, 17 Ore. 165; 20 Pac. 831). See *Nutter v. Gallagher*, 19 Ore. 375; 24 Pac. 250.

²See § 395, *ante*, and cases cited.

³The law of the erection of a dam is, that it shall not obstruct or impede the navigation of the stream (*Hall v. Lacy*, 3 Grant [Pa.], 264).

⁴*Casement v. Brown*, 148 U. S. 615; 13 S. Ct. 672; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; *Dugan v. Bridge Co.*, 27 Pa. St. 303; *Monongahela Bridge Co. v. Kirk*, 46 Id. 112; *Kerr v. West Shore R. Co.*, 127 N. Y. 269; 27 N. E. 833; *Lansing v. Smith*, 8 Cow. 146; 4 Wend. 9; *Ely v. Rochester*, 26 Barb. 133; *Varick v. Smith*, 5 Paige, 137; 9 Id. 547; *White v. Yazoo*, 27 Miss. 357; see *Sprague v. Worcester*, 13 Gray, 193; *West River Bridge Co. v. Dix*, 6 How. U. S. 545; *Pennsylvania R. Co. v. Baltimore, etc. R. Co.* 37

§ 738. **Duty to remove wrecks.** — The owner of a vessel which has been sunk in navigable waters, and abandoned by him, is under no obligation to remove the vessel,¹ and is not liable for the injuries it may cause other navigators. If, however, instead of abandoning the wreck, he retains such possession and control of it as it is susceptible of, he is bound to exercise an ordinary and reasonable degree of diligence and dispatch, either in removing it, or in preventing its doing injury to others. He is as much bound to use care in the control of his vessel while it is under water as while it is above water.² If he undertakes to remove the wreck, he is bound only to use reasonable means and expedition to accomplish that result; and the mere fact that the means employed were found inadequate, is not of itself proof of negligence.³

Fed. 129; *Vessel Owners' Towing Co. v. Wilson*, 11 C. C. A. 366; 63 Fed. 626; *McGowan v. Larsen*, 14 C. C. A. 178; 66 Fed. 910 [failure to maintain light on fish traps]. A telegraph company was held liable for so laying its cable that it became entangled in the screw of a propeller (*Stephens, etc. Transp. Co. v. Western U. Tel. Co.*, 8 Benedict, 502). *s. p.*, *Albina Ferry Co. v. The Imperial*, 38 Fed. 614. *Floatable streams* may be used for running logs, with reasonable care (*Field v. Apple River Log Co.*, 67 Wisc. 569), but not for storing them, so as to cause a protracted obstruction (*McPheters v. Moose River Log Co.*, 78 Me. 329). Compare *The Wm. N. Beach*, 29 Fed. 303. To sustain a recovery at common law for allowing logs to become jammed in a river, thereby obstructing plaintiff in the driving of his logs, negligence or other wrongful act must be shown (*Miller v. Chatterton*, 46 Minn. 338; 48 N. W. 1109; *Coburn v. Muskegon B. Co.*, 72 Mich. 134; 40 N. W. 198). Persons using navigable streams for driving logs must do so with due deference to the rights of other persons engaged in

the same business, and, in most respects, such streams are governed by the same rules as are highways upon land (*Page v. Mille Lacs Lumber Co.*, 53 Minn. 492; 55 N. W. 608).

¹ *Rex v. Watts*, 2 Esp. 675.

² *Brown v. Mallett*, 5 C. B. 599; *Hancock v. York, etc. R. Co.*, 10 C. B. 348; *White v. Crisp*, 10 Exch. 312; *Taylor v. Atlantic Ins. Co.*, 37 N. Y. 275; *affi'g* 9 Bosw. 369.

³ *Taylor v. Atlantic Ins. Co.*, 9 Bosw. 369; *affi'd*, 37 N. Y. 265. See the same case on demurrer to complaint, 2 Bosw. 106. And see *Harmond v. Pearson*, 1 Camp. 515. The owner of a scow sunk in navigable water was engaged in raising it, and had placed no signal or buoy upon it to warn passing vessels. Plaintiff's vessel ran into it and was injured. Held, the owner was liable (*Boston, etc. Steamboat Co. v. Munson*, 117 Mass. 34). The owner of a wrecked ship is not bound to break it up to prevent its doing damage where it lies, where such breaking up would sacrifice a valuable cargo (*Romney Marsh v. Trinity House*, L. R. 5 Ex. 204; *affi'd*, L. R. 7 Ex. 247).

PART VIII.

CHAPTER XXXVIII.

MEASURE OF DAMAGES.

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§ 739. **General rule of damages.** — It is not proposed to state here all the general law of damages. The most which will be attempted is to state those rules which have especial application to claims upon negligence. The liability of a

defendant, in an action upon negligence, is broader than in an action for mere breach of contract.¹ He is, however, responsible only for such damage as is proximately caused by his fault;² and the extent of this has been already defined in Chapter II, on Proximate Cause,³ as being such as a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had been suggested to his mind. All expenses which the plaintiff would have had to incur, in order to secure the advantages which he claims to have lost by reason of

¹ *Ehrgott v. New York*, 96 N. Y. 264.

² See § 26, *ante*; *Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210; *Dubuque Wood, etc. Asso. v. Dubuque*, 30 Iowa, 176. "In cases in which there is neither fraud, malice, nor oppression, the law will not generally, in making compensation to the injured party, take into consideration remote or consequential damages. The measure of damages is the direct pecuniary loss sustained by the party" (per Allen, J., *Walrath v. Redfield*, 11 Barb. 368). S. P., per Spencer, C. J., *Butler v. Kent*, 19 Johns. 223. Where, through the negligence of officers of a bank, some of its unsigned bills were stolen, and afterward the president's signature was forged upon them, it was held that the bank was not responsible (*Salem Bank v. Gloucester Bank*, 17 Mass. 1, 32). Where a corporation is authorized to build a dam across a stream, it will be liable for damages caused by an overflow of the banks by reason of the dam. They are not such remote and consequential damages as are not recoverable (*Ten Eyck v. Delaware, etc. Canal*, 18 N. J. Law, 200). The loss of profits on a line of stages, the running of which was prevented by the city's neglect to

repair the streets, is not recoverable from the city (*Farrelly v. Cincinnati*, 2 Disney, 516). S. P., *Brooks v. Boston*, 19 Pick. 174. Where a mistake was made in a telegram, directing payment of \$5,000, instead of \$500, to an agent, who absconded with the money, it was held that the embezzlement and not the mistake was the proximate cause of the loss (*Lowery v. Western U. Tel. Co.*, 60 N. Y. 198). Where the loss caused by the non-delivery of a telegram was by failure to take steps to recover of one insolvent, or on the verge of insolvency, it was held that the possibility of recovering the money, had the dispatch been received in time, was a contingency too remote to sustain a recovery (*First Nat. Bank v. Western U. Tel. Co.*, 30 Ohio St. 555). Plaintiff alleged the loss, by a flood, of certain staves, owing to defendant's not delivering a telegram announcing arrival of a barge upon which the staves were to have been shipped. Held, that plaintiff should recover damages for loss of the ordinary use of the barge, but not for loss of the staves, which might have been saved by the use of the barge (*Bodkin v. Western U. Tel. Co.*, 31 Fed. 134).

³ See § 25, *et seq.*, *ante*.

defendant's negligence, must be deducted from his recovery.⁴ Special damage cannot be recovered unless pleaded, as in other cases;⁵ although a recovery may be had for permanent injuries, without a special allegation thereof.⁶ The fact that one, who sues on a good cause of action for negligence, has a remedy also against a third person, does not diminish his recovery of damages.⁷

§ 740. Uncertainty ; how resolved. — While damages must be reasonably certain,¹ and the burden of proving damages rests, in a general sense, upon the plaintiff,² yet if, through no fault of his, the precise damage sustained cannot be accurately determined, the wrong-doer must bear the burden of that difficulty.³ In such case, therefore, doubts are to be resolved in favor of the injured party,⁴ leaving him, in case he is compelled to pay in part for the fault of some one else, to such remedy as he may have against others.⁵ The jury are not, however, to be left to assess damages by guess-work, but must be instructed by the court as to the principles which should guide their action, so far as that is possible.⁶

⁴ *Western U. Tel. Co. v. Brown*, 84 Tex. 54; 19 S. W. 336 [expense of transportation].

⁵ *Carples v. N. Y. & Harlem R. Co.*, 16 N. Y. App. Div. 158; 44 N. Y. Supp. 670; *Gilligan v. Harlem R. Co.*, 1 E. D. Smith, 453; *Atchison, etc. R. Co. v. Willey*, 57 Kans. 764; 48 Pac. 25; *Butler v. Kent*, 19 Johns. 223; *Laing v. Colder*, 8 Pa. St. 479; *Baldwin v. Western R. Co.*, 4 Gray, 333; *Patten v. Libbey*, 32 Me. 378.

⁶ *Tyler v. Third Ave. R. Co.*, 18 N. Y. Misc. 165; 41 N. Y. Supp. 523.

¹ *Strause v. Western U. Tel. Co.*, 8 Bissell, 104. See *Ehrgott v. New York*, 96 N. Y. 264.

² *Leeds v. Met. Gas Co.*, 90 N. Y. 26; *Strohm v. N. Y., Lake Erie, etc. R. Co.*, 96 N. Y. 305; *Hardy v. Milwaukee R. Co.*, 89 Wisc. 183; 61 N. W. 771.

³ *Leeds v. Met. Gas Co.*, 90 N. Y. 26.

⁴ The wrong-doer must suffer from the impossibility of accurately as-

certaining the amount of damage (*Leeds v. Amherst*, 20 Beav. 239; *Toledo, R. Co. v. Tucker*, 13 Ohio C. C. 411).

⁵ Where the evidence shows substantial damages caused by the defendant's negligence, the failure to distinguish as to all the items between the expenditures thereby incurred, and those for which defendant was not liable, does not limit the recovery to nominal damages (*Mark v. Hudson River Bridge Co.*, 103 N. Y. 28; 8 N. E. 243).

⁶ *Ehrgott v. New York*, 96 N. Y. 264, 283; *Ring v. Cohoes*, 77 Id. 83.

⁷ *Erie Iron Works v. Barber*, 102 Pa. St. 156. *Gordon, J.*, said: "We also think that complaint is justly made of the court below in that it gave to the jury no rule for the assessment of damages, but left the determination of this matter to the mere caprice of that body." And

§ 741. Damages which might be avoided. — The plaintiff cannot recover compensation for any damage which he might have avoided by the use of ordinary care and diligence, after first becoming aware of the injury of which he complains.¹ Thus, where cattle designed for food are injured by the defendant's negligence, yet remain fit for slaughter, the plaintiff is not at liberty to abandon them, and recover their full value. He must dispose of them to the best advantage, and can only recover the loss which he would sustain by doing so. So, if a railroad train fails to stop and take on a passenger, he cannot charge the company with the fatigue and illness caused by his walking to his destination, if he could ride at another time or in another way.² So where one who sends a telegram learns that a mistake has been made in or about it, he must try to remedy the error.³ But the plaintiff is not required to use

see *Indianapolis, etc. R. Co. v. Birney*, 71 Ill. 391.

¹ *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *Milton v. Hudson R. Steamboat Co.*, 37 Id. 210; *Hamilton v. McPherson*, 28 Id. 72; *Miller v. Mariner's Church*, 7 Maine, 51; *Jenks v. Wilbraham*, 11 Gray, 143; *State v. Powell*, 44 Mo. 436; *Toledo, etc. R. Co. v. Pindar*, 53 Ill. 447; *Akridge v. Atlanta, etc. R. Co.*, 90 Ga. 232; 16 S. E. 81; *Salladay v. Dodgeville*, 85 Wisc. 318; 55 N. W. 696 [question for jury]. Defendant obstructed plaintiff's drain, and plaintiff could have indemnified himself for twenty-five dollars, but, by delaying to repair, the damages amounted to \$100. Held, that plaintiff could recover only twenty-five dollars (*Lloyd v. Lloyd*, 60 Vt. 288; 13 Atl. 638). Where plaintiff's house was rendered insecure by an overflow caused by defendant, he could not contribute to his own loss by placing goods in it and hold defendant liable for their destruction (*Galveston, etc. R. Co. v. Ware*, 67 Tex. 635). A railroad company, which negligently sets fire to premises, is not liable for

damages which the exercise of ordinary care by the owner of the property might have prevented (*Austin v. Chicago, etc. R. Co.*, 93 Wisc. 496; 67 N. W. 1129). A person injured by another's negligence cannot recover for any aggravation of the injury, caused by his failure to use ordinary care in securing medical treatment and in continuing the same so long as his injuries appear reasonably to require it (*Citizens' R. Co. v. Hobbs*, 15 Ind. App. 610; 43 N. E. 479). To the contrary, is *Winter v. Central Iowa R. Co.*, 80 Iowa, 443; 45 N. W. 737. Compare note 5, below. See *Sherman v. Fall River Iron Co.* (2 Allen, 524), where it was held that plaintiff could not recover for damage to his horses, caused by their drinking water fouled by the defendant, after plaintiff became aware of the state of the water. See also *Wright v. Illinois, etc. Tel. Co.*, 20 Iowa, 195.

² *Indianapolis, etc. R. Co. v. Birney*, 71 Ill. 391.

³ *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744. Plaintiff sent an order for 1,000 shares; and, after knowing

more than ordinary care for the purpose of avoiding or mitigating damages,⁴ still less to use more care than would have been required to avoid the injury altogether.⁵ This rule is, in general, only applicable to cases in which the injury caused by the plaintiff's fault is distinctly separable from that caused by the defendant's negligence;⁶ but if, by the plaintiff's fault, the extent to which his own negligence contributed to his damage cannot be distinguished, the case falls under the general rule of contributory negligence, and he can recover nothing.⁷ Whether the damages have been increased by such subsequent negligence is generally a question for the jury.⁸

§ 742. **Disease resulting from injury.**— There are many cases in the books turning upon the connection between an injury suffered by defendant's negligence and some subsequently developed infirmity or disease: the inquiry being

that it had been delivered as an order for 100 shares, he did not renew the order. Held that, for an advance in price, so far as it occurred after he could have remedied the mistake, he could not recover (*Marr v. Western U. Tel. Co.*, 85 Tenn. 529).

⁴ *Moore v. Kalamazoo*, Mich. ; 66 N. W. 1089 [delay in calling surgeon]. One whose cattle are injured by the fault of another, is not bound to put them on what he regards as a poor market, though they be in a marketable condition (*McClene-ghan v. Omaha, etc. R. Co.*, 25 Neb. 523 ; 41 N. W. 350). The owner of a pasture was deprived of its use by the failure of a railroad company to construct cattle-guards. Held, he was not defeated by the fact that he had not avoided damage by making the grass into hay (*Raridan v. Central Iowa R. Co.*, 69 Iowa, 527). An injured person is not bound to refrain from taking exercise (*Foels v. Tonawanda*, 59 Hun, 567 ; 14 N. Y. Supp. 46). The plaintiff is certainly not debarred from recovering from

the party by whose fault he was wounded all the damage which ensues, though part of it is caused by a surgeon's unskillfulness, if the surgeon bore a good reputation for skill (*Stover v. Bluehill*, 51 Me. 442 ; *Tuttle v. Farmington*, 58 N. H. 13).

⁵ It is not error for the court to refuse to instruct the jury that plaintiff was bound to engage medical aid and attention for such a length of time as his injuries made necessary, since such a charge would have required greater care in mitigating the consequences of the injury than the law requires in the first instance to avoid it (*Vallo v. U. S. Exp. Co.*, 147 Pa. 404 ; 23 Atl. 594).

⁶ *Gould v. McKenna*, 86 Pa. St. 297 ; 27 Am. Rep. 705 ; *Stebbins v. Central, etc. R. Co.*, 54 Vt. 464 ; 41 Am. Rep. 855 ; *Hibbard v. Thompson*, 109 Mass. 286 ; *Fay v. Parker*, 53 N. H. 343 ; *Matthews v. Warner*, 29 Gratt. 570 ; *Wright v. Ill., etc. Tel. Co.*, 20 Iowa, 195.

⁷ *Potter v. Warner*, 91 Pa. St. 362 ; *Hibbard v. Thomson*, 109 Mass. 286.

⁸ *Bardwell v. Jamaica*, 15 Vt. 438.

whether the latter is the proximate, natural result of the original injury. There is substantial uniformity of doctrine that every such subsequently developed disease, which would naturally ensue from the injury, and which cannot be shown to have resulted from a sufficient independent cause, must be imputed to the author of the original injury.¹ Though the plaintiff be inflicted with a disease or a weakness which has a tendency to aggravate the injury, defendant's negligence will still be held to be the proximate cause;² and the defense that

¹ *Denver, etc. R. Co. v. Harris*, 122 U. S. 597 [impotence from wound in the groin]; *Ehrgott v. New York*, 96 N. Y. 264 [disease of spine, resulting from being thrown from carriage by defect in street, and by subsequent exposure]; *Hurley v. N. Y., etc. Brewing Co.*, 13 N. Y. App. Div. 167; 43 N. Y. Supp. 259 [consumption]; *Stephen v. Woodruff*, 18 N. Y. App. Div. 625; 45 N. Y. Supp. 712; *Lake Shore, etc. R. Co. v. Rosenzweig*, 113 Pa. St. 519 [spinal disease from blow on the back]; *Jucker v. Chicago, etc. R. Co.*, 52 Wisc. 150 [shock of blow from locomotive, followed by death by pneumonia]; *Delie v. Chicago, etc. R. Co.*, 51 Id. 400; [hernia, following nine months after scalding by steam escaping from locomotive]; *Baltimore, etc. R. Co. v. Kemp*, 61 Md. 74 [cancer, the result of a blow on the breast of female passenger]; *Terre Haute, etc. R. Co. v. Buck*, 96 Ind. 346 [death by malarial fever, following upon fall into a creek in the night-time]; *Houston, etc. R. Co. v. Leslie*, 57 Tex. 83 [erysipelas]; *Dickson v. Hollister*, 123 Pa. St. 421; 16 Atl. 484 [same]; *Alabama, etc. R. Co. v. Hill*, 93 Ala. 514; 9 So. 722 [female troubles]; *Powell v. Augusta, etc. Co.*, 77 Ga. 192; 3 S. E. 757 [same]; *Quackenbush v. Chicago, etc. R. Co.*, 73 Iowa, 458; 35 N. W. 523 [catarrh]; *Bishop v. St. Paul R. Co.*, 48 Minn. 26; 50 N. W.

W. 927 [paralysis]; *Purcell v. St. Paul R. Co.*, 48 Minn. 134; 50 N. W. 1034 [fright and convulsions].

² A passenger injured by negligence of the carrier is entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury (*Purcell v. St. Paul R. Co., supra.* *s. p.*, *Crane Elevator Co. v. Lippert*, 63 Fed. 942; 11 C. C. A. 521 [microbes]; *Schwanzer v. Brooklyn R. Co.*, 18 N. Y. App. Div. 205; 45 N. Y. Supp. 889; *Chicago, etc. R. Co. v. Hunerberg*, 16 Ill. App. 387 [miscarriage, the result of shock, though not of any direct physical injury]; *Oliver v. La Valle*, 36 Wisc. 592 [miscarriage, the result of fright and exertions; team breaking through bridge]; *Shartle v. Minneapolis*, 17 Minn. 308 [the same]; *Brown v. Chicago, etc. R. Co.*, 54 Wisc. 342 [miscarriage, brought on by getting off at wrong station, by direction of defendant's servants and walking to place of safety]. By reason of the non-repair of a street an injury was sustained by a person who was afflicted with a scrofulous disease. The damages suffered were greatly in excess of those which he would have suffered had he not been so afflicted. Nevertheless, the damages were held to be the natural results of the negligence. A muni-

the sufferer died from an independent disease is not made out, unless it is clearly shown that death must have ensued, independent of the injury.³ Aggravation of an existing disease may be allowed for in the damages awarded.⁴ Although the physician who attended the injured person may have omitted to apply the remedy most approved in similar cases, and by reason thereof the damage was greater than it otherwise would have been, yet the party causing the original injury is liable for the actual damage, because his negligence was its proximate cause.⁵ But where the injury caused disease of the brain, and this, after a long interval, produced insanity, under the influence of which the injured person committed suicide, this result was held too remote to afford a cause of action.⁶ Many cases might be cited on the allowance of damages for disease or annoyance caused by a nuisance.⁷

principal corporation must keep its streets in repair for the sick and infirm as much as for the well (*Stewart v. Ripon*, 38 Wisc. 584).

³ *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163; 15 N. W. 65; *Louisville, etc. R. Co. v. Jones*, 83 Ala. 376; 3 So. 902.

⁴ *Louisville, etc. R. Co. v. Jones*, 108 Ind. 551; 9 N. E. 476; *Montgomery, etc. R. Co. v. Mallette*, 92 Ala. 209; 9 So. 363; *Bray v. Latham*, 81 Ga. 640; 8 S. E. 64; *Woodard v. Boscobel*, 84 Wisc. 226; 54 N. W. 332; *Louisville, etc. R. Co. v. Northington*, 91 Tenn. 56; 17 S. W. 880; *Schwingschlegel v. Monroe City*, Mich. ; 72 N. W. 7; *Emery v. Boston & M. R. Co.*, N. H. ; 36 Atl. 367. Defendant may show that plaintiff was diseased at the time of the accident, and that such disease was calculated to retard recovery from the injuries received (*Fuller v. Jackson*, 92 Mich. 197; 52 N. W. 1075).

⁵ *Loeser v. Humphrey*, 41 Ohio St. 378; *Pullman Car Co. v. Bluhm*, 109 Ill. 20 [broken bone badly set by carefully selected surgeon; defendant liable for unfavorable result]; *Sauter v. N. Y. Central R. Co.*, 66

N. Y. 50 [unsuccessful medical operation by a competent surgeon]; *St. Louis, etc. R. Co. v. Doyle* [Tex. Civ. App.], 25 S. W. 461 [amputation]. To the same effect are *Collins v. Council Bluffs*, 32 Iowa, 324; *Rice v. Des Moines*, 40 Id. 638; *Stover v. Bluehill*, 51 Me. 442; *Eastman v. Sanborn*, 3 Allen, 594. Such a case differs from one of malpractice, where the negligence of physician and patient concur (*Brown v. Marshall*, 47 Mich. 576; 11 N. W. 392; *Grotsch v. Steinway R. Co.*, 19 N. Y. App. Div. 130; 45 N. Y. Supp. 1075).

⁶ *Scheffer v. Washington, etc. R. Co.*, 105 U. S. 249. And in *Phillips v. Dickerson* (85 Ill. 11), it was held that one who went to the house of a neighbor, and quarreled with him, using violent language, in consequence of which the neighbor's wife became so frightened that she gave premature birth to a child, was not liable for this catastrophe, it not being a natural and probable consequence of his violent conduct.

⁷ See *Baltimore, etc. R. Co. v. Fifth Bap. Church*, 108 U. S. 317; 2 S. Ct. 719; *Brown v. Chicago, etc.*

§ 743. **Future damage.**— If the injury is a continuing one, and of such a nature that repeated actions can be brought upon it, from time to time, damages can be recovered only up to the commencement of the action.¹ But in other cases (which are chiefly, but not exclusively, actions on personal injuries) the plaintiff may recover, not only the amount of damage which he suffered prior to the commencement of the action, but also all the damage, proceeding continuously from the injury complained of, which he has suffered up to the verdict,² and which it is reasonably certain that he will suffer in the future.³ There must, however, be a reasonable certainty

R. Co., 80 Mo. 457; *Kemper v. Louisville*, 14 Bush, 87; *Loughran v. Des Moines*, 72 Iowa, 382; 34 N. W. 172. The fact that the property owner gave the city permission to build a sewer through his property does not work an estoppel upon him to sue the city for damages resulting from its improper construction and negligent use, where the consent was to a mere overflow sewer, and the sewer, as completed, is one used for the constant discharge of noxious sewage (*Id.*)

¹ *Uline v. N. Y. Central R. Co.*, 101 N. Y. 98; 4 N. E. 536; *Reed v. State*, 108 N. Y. 407; 15 N. E. 735; *Phelps v. New Haven, etc. R. Co.*, 43 Conn. 453; *Savannah, etc. Canal Co. v. Bourquin*, 51 Ga. 378; and many other cases cited in the *Uline* case, above.

² Unless the injury complained of is of such a nature that actions can continually be brought from time to time, the jury may assess all the damages plaintiff has sustained up to the time of the trial. *Carples v. Harlem R. Co.*, 16 App. Div. 158; 44 N. Y. Supp. 670; *Dailey v. Dismal Swamp Canal Co.*, 2 Ired. N. C. Law, 222. But compare *Houston R. Co. v. Richart*, 87 Tex. 539; 29 S. W. 1040.

³ In an action for personal in-

juries, plaintiff may recover for future damages when the evidence justifies a finding that such damages will inevitably and necessarily result (*Washington, etc. R. Co. v. Harmon*, 147 U. S. 571; 13 S. Ct. 557; *Filer v. N. Y. Central R. Co.*, 49 N. Y. 45; *Wallace v. Western N. C. R. Co.*, 104 N. C. 442; 10 S. E. 552; *Alexander v. Humber*, 86 Ky. 565; 6 S. W. 453; *Frink v. Schroyer*, 18 Ill. 416; *Peoria Bridge Asso. v. Loomis*, 20 Id. 235; *Gorham v. Kansas City, etc. R. Co.*, 113 Mo. 408; 20 S. W. 1060; *Townsend v. Paola*, 41 Kans. 591; 21 Pac. 596). Such future damages may include pain, suffering and permanent loss of health. So held in railway accident cases (*Kane v. N. Y., New Haven, etc. R. Co.*, 132 N. Y. 160; 30 N. E. 256; *Feeney v. Long Island R. Co.*, 116 N. Y. 376; 22 N. E. 402; *Curtis v. Rochester, etc. R. Co.*, 18 N. Y. 534; *Spicer v. Chicago, etc. R. Co.*, 29 Wisc. 580; *Stutz v. Chicago, etc. R. Co.*, 73 Wisc. 147; 40 N. W. 653; *Atlanta, etc. R. Co. v. Johnson*, 66 Ga. 259; *Lake Shore, etc. R. Co. v. Johnsen*, 135 Ill. 641; 26 N. E. 510; *Johnson v. Northern Pac. R. Co.*, 47 Minn. 430; 50 N. W. 473; *Waterman v. Chicago, etc. R. Co.*, 82 Wisc. 613; 52 N. W. 247 [jury may estimate length of life]; *Union Pac. R. Co.*

as to such future damage. A mere *probability* of its occurrence is not enough.⁴ Compensation for future damage must be estimated upon its *present* worth; that is, such sum as, if now invested, at the usual interest, would produce the equivalent of the damage, when that will occur.⁵

§ 744. **Loss of profits.** — The current of the earlier decisions upon the subject appears to be opposed to any allowance for the plaintiff's loss of profits in cases of direct injury to person or property, though plainly resulting from the defendant's negligence. Thus, in cases of collision between vessels, the courts of admiralty and of common law have refused to allow for profits which the injured vessel might probably have made

v. Jones, 49 Fed. 343; 4 U. S. App. 115; 1 C. C. A. 282). So, also, in actions against towns and counties (Sandwich v. Nolan, 141 Ill. 430; 31 N. E. 416; Nappanee v. Ruckman, 7 Ind. App. 361; 34 N. E. 609; Miller v. Boone county, 95 Iowa, 5; 63 N. W. 352; Weisenberg v. Appleton, 26 Wisc. 56); and individuals (Propson v. Leathem, 80 Wisc. 608; 50 N. W. 586). See further citations under § 758, *post*.

⁴The language of the text was employed in Strohm v. N. Y., Lake Erie, etc. R. Co. (96 N. Y. 305), and judgment for plaintiff was reversed because the evidence as to future damage was too speculative. Re-affirmed, Tozer v. N. Y. Central R. Co., 105 N. Y. 617; 11 N. E. 369. Evidence or findings that future sufferings "may" occur are never sufficient. The following cases are directly in point: Curtis v. Rochester, etc. R. Co., 18 N. Y. 534, 542; White v. Milwaukee R. Co., 61 Wisc. 536; 21 N. W. 524; Hardy v. Milwaukee R. Co., 89 Wisc. 183; 61 N. W. 771; Clark v. Nevada Land, etc. Co., 6 Nev. 203; Cameron v. Union Tr. Line, 10 Wash. 507; 39 Pac. 128. For examples of evidence,

held, not open to this objection, although not positive, see Saltzman v. Brooklyn R. Co., 73 Hun, 567; 26 N. Y. Supp. 311; Rhines v. Royalton, 61 Hun, 624; 15 N. Y. Supp. 944. The court must instruct that damages for permanent injuries cannot be allowed unless it is "reasonably certain" such injuries have been received (Swift v. Raleigh, 54 Ill. App. 44). A charge that the jury should allow for the pecuniary loss plaintiff "is *likely* to sustain during the remainder of his life, from his disabled condition;" held, correct (Scott v. Montgomery, 95 Pa. St. 444). But such a charge was held error in Meeteer v. Manhattan R. Co., 63 Hun, 533; 18 N. Y. Supp. 561; Hardy v. Milwaukee R. Co., 89 Wisc. 183; 61 N. W. 771 ["may have to endure hereafter"]; Raymond v. Keseberg, 91 Wisc. 191; 64 N. W. 861.

⁵Where future payments for the loss of earning power are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth (Goodhart v. Pennsylvania R. Co., 177 Pa. St. 1; 35 Atl. 191; Kinney v. Tolkerts, 84 Mich. 616; 48 N. W. 283).

upon a new voyage from her port of destination,¹ or even by completing the voyage which was broken up.² And where a steamboat was delayed by obstructions negligently placed in the river, it has been held that the owner of the boat could not recover for profits which he could have made meantime.³ But later decisions expressly allow the recovery of profits on property injured, where they would to a reasonable certainty have been earned, had not the injury occurred.⁴ In Great Britain,⁵ New York, Connecticut, Indiana and Michigan, the allowance of profits is a settled rule;⁶ but not in Pennsyl-

¹ *Smith v. Condry*, 1 How. U. S. 28. The same ruling was made in cases of illegal prize captures and detentions, where the action was brought against persons who were not willful wrong-doers (*The Lively*, 1 Gall. 314; *The Anna Maria*, 2 Wheat. 327; *The Amiable Nancy*, 3 Id. 546).

² *Hunt v. Hoboken Land, etc. Co.*, 3 E. D. Smith, 144. S. P., as to prohibited contracts, *Cothran v. Western U. Tel. Co.*, 83 Ga. 25; 9 S. E. 836.

³ *Benson v. Malden, etc. Gas Co.*, 6 Allen, 149.

⁴ *The Narragansett, Olcott*, 388; *Williamson v. Barrett*, 13 How. U. S. 106; *The Rhode Island*, 2 Blatchf. 113; *Vantine v. The Lake*, 2 Wallace, Jr. 52.

⁵ *Heard v. Holman*, 19 C. B. N. S. 1.

⁶ Where, through negligence of defendants in grading streets, plaintiff's land was overflowed, and he was obliged to suspend work on his mill for fourteen days, held, that plaintiff was entitled to a compensation for the loss of profits during the suspension (*Lacour v. New York*, 3 Duer, 406; *Terre Haute v. Hudnut*, 112 Ind. 542; 13 N. E. 686). S. P., *Shelbyville, etc. R. Co. v. Lewark*, 4 Ind. 471. [loss of use of wagon]; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420 [use of

steamboat]. Where plaintiff's toll-bridge was carried away by defendant's fault, held that plaintiff could recover the value of what was carried away, and the loss of tolls during the time that was reasonably necessary to repair or rebuild (*Sewall's Falls Bridge v. Fisk*, 3 Foster, 171). In an action for injuries to a traction engine, caused by defects in a bridge, evidence that plaintiff had work for the engine to perform for many days ahead, when the injuries occurred, is admissible on the question of damages (*Woodbury v. Owosso*, 69 Mich. 479; 37 N. W. 547). See *Griffin v. Colver*, 16 N. Y. 489, a case arising on contract, in which the whole question is discussed. Plaintiff kept a refectory opposite to a market. In repairing this market, obstructions were placed in the street by defendant, by which he sustained injury. Held, that plaintiff was entitled to recover the loss sustained by him in his business caused by the continuance of the obstructions (*St. John v. New York*, 6 Duer, 315). "In actions against a tort-feasor, the loss of profits may be taken into view in estimating the damages, though in actions for a breach of contract the general rule is otherwise" (Per Woodruff, J., *Walter v. Post*, 6 Duer, 363, 373). Where the machinery of a factory

vania, where legal interest is regarded as the most convenient measure of damages for loss of profits.⁷ Where the injury to property is merely partial, the plaintiff can recover profits only for such time as it would necessarily take to repair the thing.⁸ For the rule as to evidence of profits or earnings, in actions on personal injuries, see § 758, *post*. As to loss of profits, as an element of damage in telegraph cases, see § 755, *post*.

§ 745. **Speculative or illegal profits not allowed.** — Speculative and merely possible profits are never allowed. The source of profit must be ascertained, and its extent defined; and its realization must appear to have been reasonably certain.¹ Nothing can be allowed for the loss of profits in an illegal business, such, for example, as a traffic carried on with-

could not be used because of defendant's fault, the damages were not the difference between what might have been earned by the factory with the engine in operation, and without it during the time lost; but were limited to the ordinary rent or hire during that time, which could have been obtained for the use of the machinery (*Cassidy v. Le Fevre*, 45 N. Y. 562). See, also, *Myers v. Burns*, 35 Id. 269.

⁷*Erie Iron Works v. Barber*, 103 Pa. St. 156. Where plaintiff had paid the city for making a water-main in front of his houses, and had paid water rents for, and through the city's negligence the pipes burst and his tenants refused to pay rent and moved out; held, that he could recover the water rents, but could not recover for loss of house rents (*Smith v. Philadelphia*, 81 Pa. St. 38).

⁸Thus, in *Ludlow v. Yonkers* (43 Barb. 493), where plaintiff's mill was injured, in 1861, by defendant's negligence in building a wall, and, on the trial of the cause, in 1864, it appeared that the injury had never been repaired, and the mill had never since been fit for use, the referee allowed the rent of the mill

for the whole time as damages. Held, error; if rent was recoverable at all, it could be only for such time as it would take to repair the injury. S. P., *Fort v. Orndoff*, 7 Heisk. 167.

¹Plaintiff not allowed to recover loss of profits on gold and silver which could not be sold while he was laid up by his injuries, because he alone had the combination of the safe which contained them (*Phyfe v. Manhattan R. Co.*, 30 Hun, 377). It is not proper to consider the fact that the plaintiff was in the line of promotion in his calling, and that if promoted he would have received increased earnings (*Brown v. Chicago, etc. R. Co.*, 64 Iowa, 652, 21 N. W. 193). See, also, *Richmond, etc. R. Co. v. Allison*, 86 Ga. 145; 12 S. E. 353. A carrier lost a set of dentist's instruments: held, not liable for the profits and earnings which the dentist might have made but for the loss (*Brock v. Gale*, 14 Fla. 523). See further examples in *Watt v. Nevada Cent. R. Co.*, Nev. ; 44 Pac. 423; *Austin v. Ritz*, 72 Tex. 391; 9 S. W. 884. As to telegraph cases, see § 755, *post*.

out the license required by a statute.² By "speculative profits," however, is by no means intended "profits on a speculation." Most profits are of that nature. The profits not allowed are those, the very existence of which must be a matter of mere speculation in the mind, — profits, as to which no one can say, with any reasonable certainty, that they would ever have been gained.³

§ 746. Recovery on property not to exceed value. — In no case should the plaintiff be allowed to recover damages for injury or delay to property, exceeding the value of the property injured or delayed, unless, perhaps, where the circumstances were such that a reasonable and prudent man could not have foreseen that they would reach such an amount during the delay, or unless the thing could not be replaced within the period in which profits would have been earned, or unless the plaintiff has been induced by the defendant to refrain from purchasing other property in place of that, the use of which has been delayed.¹

§ 747. Interest as damages. — In actions of tort to recover unliquidated damages to property, interest may sometimes be allowed by the jury, on the amount of estimated injury, from the commencement of the action by way of damages. Thus, where damages are recovered for a trespass, the allowance of interest thereon is proper,¹ as it is also where property has been lost or destroyed by the negligence of another.² In Connecticut, where property was negligently destroyed; but without aggravating circumstances, the damages allowed were its value with

² So held as to an unlicensed liquor store (*Kane v. Johnston*, 9 Bosw. 154); and livery stable (*Sherman v. Fall River Iron Works Co.*, 2 Allen, 524; s. c. again, 5 Id. 213). Where a physician claims loss of profits, defendant may show that his practice was unlawful (*Jacques v. Bridgeport R. Co.*, 41 Conn. 61).

³ See illustrations, §§ 753*a*, 755, *post*.

¹ *Russell v. Roberts*, 3 E. D. Smith, 318.

¹ *Duryee v. New York*, 96 N. Y.

477; *Mairs v. Manhattan Real Est. Assn.*, 89 Id. 498; *Walrath v. Redfield*, 19 Id. 457.

² *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361; *Fremont, etc. R. Co. v. Marley*, 25 Neb. 138; 40 N. W. 948; *The Mary J. Vaughan*, 2 Benedict, 47. Where interest may be recovered as damages or indemnity, its recovery rests in the discretion of the jury (*Heidenheimer v. Ellis*, 67 Tex. 426); but the legal rate must govern (*Sanders v. Lake Shore, etc. R. Co.*, 94 N. Y. 641).

interest thereon from the time of loss.³ But such interest can only be allowed, where the damages could be approximately ascertained, so that a sufficient amount could have been tendered to the plaintiff.⁴ Interest cannot, therefore, be allowed on damages for personal injuries or any other damages, resting in the discretion of a jury.⁵ unless expressly allowed by statute.⁶

§ 748. **Exemplary damages.** — Exemplary, vindictive, or punitive damages can never be recovered in actions upon anything less than gross negligence.¹ Of this there can be no

³ Parrott v. Housatonic R. Co., 47 Conn. 575.

⁴ Gray v. Central R. Co., 89 Hun, 477; 35 N. Y. Supp. 378; Button v. Kinnitz, 88 Hun, 35; 34 N. Y. Supp. 522.

⁵ Sonnenfeld Co. v. People's R. Co., 59 Mo. App. 668. It is error to direct the jury to allow interest; the allowance of interest resting in the discretion of the jury (Jamieson v. N. Y. & Rockaway R. Co., 11 N. Y. App. Div. 50; 42 N. Y. Supp. 915).

⁶ See N. Y. Code Civ. Pro., § 1904; see Salter v. Utica, etc. R. Co., 86 N. Y. 401.

¹ In the absence of proof that defendant's negligence was either willful, wanton, or reckless, an instruction that plaintiff cannot recover exemplary damages is improperly refused (Alabama, etc. R. Co. v. Arnold, 84 Ala. 159; 4 So. 359). To similar effect, see Richmond, etc. R. Co. v. Vance, 93 Ala. 144; 9 So. 574 [latent defect]; Gibney v. Lewis, 68 Conn. 392; 33 Atl. 799; Talbot v. West Va. R. Co., 42 W. Va. 560; 26 S. E. 311; Eliason v. Grove, 85 Md. 215; 36 Atl. 844; East Tennessee, etc. R. Co. v. Lee, 90 Tenn. 570; 18 S. W. 268; Stohrer v. St. Louis, etc. R. Co., 91 Mo. 509; 4 S. W. 389; Kansas City, etc. R. Co. v. Kier, 41 Kans. 661; 21 Pac. 770; Moody v. McDonald, 4 Cal. 297; Jackson v.

Schmidt, 14 La. Ann. 818). And the acts of gross negligence must have contributed to the accident (Missouri Pac. R. Co. v. Johnson, 72 Tex. 95; 10 S. W. 325). In an action merely for carrying plaintiff beyond his destination, punitive damages cannot be recovered (Carter v. Illinois Cent. R. Co. [Ky.], 34 S. W. 907; Judice v. Southern Pac. Co. 47 La. Ann. 255; 16 So. 816; Kansas City, etc. R. Co. v. Fite, 67 Miss. 373; 7 So. 223). Plaintiff having a first-class ticket was compelled to occupy another car which was not so comfortable. Held, not entitled to punitive damages as he was not subjected to force or insult (Holmes v. Carolina Central R. Co., 94 N. C. 318). See Heil v. Glanding, 42 Pa. St. 493. Where a passenger is wrongfully ejected by a conductor acting in good faith and with the exercise of no more force than is reasonably necessary, the damages to be allowed are compensatory only (Pine v. St. Paul R. Co., 50 Minn. 144; 52 N. W. 392; Hoffman v. Northern Pac. R. Co., 45 Minn. 53; 47 N. W. 312; McMillan v. Federal St. R. Co., 172 Pa. St. 523; 33 Atl. 560; Denver Tr. Co. v. Cloud, 6 Colo. App. 445; 40 Pac. 779). No amount of inconvenience or suffering is of itself a ground for damages (Norfolk, etc. R. Co. v. Lipscomb, 90 Va. 137; 17 S. E. 809;

doubt. There are many reported cases of mere ordinary negligence, in which damages have been awarded by juries to so large an amount as to seem equivalent to exemplary damages; but, where such verdicts have been allowed to stand it has been upon the ground that the court could not clearly see that the amount awarded was more than a just compensation for the injury. It is often said that exemplary damages may be awarded for gross negligence.² But it should be distinctly understood that the gross negligence, for which such damages can be allowed, means such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others. And such appears to us to be the construction put upon these words by the courts, in the cases referred to.³ It is only in cases of such recklessness that, in

Hansley v. Jamesville, etc. R. Co., 115 N. C. 602; 20 S. E. 528). It is error to leave the question of punitive damages to the jury, when there is no evidence which would warrant a verdict for other than compensatory damages (*Pittsburgh, etc. R. Co. v. Taylor*, 104 Pa. St. 306). In Washington, punitive damages cannot be recovered for personal injuries, however occasioned (*Spokane Truck Co. v. Hoefer*, 2 Wash. St. 45; 25 Pac. 1072).

² Where the jury were at liberty, from the evidence, to find that the injury complained of was caused either by the gross negligence of defendant or the wanton mischief of his agents, a verdict awarding exemplary damages will not be disturbed (*Taylor v. Grand Trunk R. Co.*, 49 N. H. 304; *Welch v. Durand*, 36 Conn. 182; *Vicksburg, etc. R. Co. v. Patton*, 31 Miss. 156; *Kountz v. Brown*, 16 B. Monr. 577; *Hopkins v. Atlantic, etc. R. Co.*, 36 N. H. 9; *Beale v. Railway Co.*, 1 Dill. 568). If plaintiff proves gross negligence in the

defendant's treatment of his disease, he may recover vindictive damages (*Cochran v. Miller*, 13 Iowa, 128). Plaintiff may recover punitive damages if he shows that the accident resulted from the company's failure to use such diligence in keeping its track in repair as a person of common sense and reasonable skill, but of careless habits, would observe (*Louisville, etc. R. Co. v. Greer*, 94 Ky. 169; 29 S. W. 337).

³ When negligence is so gross as to evince an entire want of care, and is sufficient to raise a presumption that the defendant, being cognizant of the probable consequences, is indifferent to the danger to which the person may be exposed, exemplary damages may be awarded (*Alabama, etc. R. Co. v. Arnold*, 80 Ala. 600; 2 So. 337. The jury may take into consideration the motives of defendant; and if the negligence was accompanied with a contempt of plaintiff's rights and convenience, they may give exemplary damages (*Emblen v. Myers*, 6 Hurlst. & N. 54).

our opinion, exemplary damages should be allowed.⁴ In such cases, however, the right of the jury to award such damages is well settled;⁵ and it is a very just and necessary restraint upon a disregard of others' rights. It is not necessary, in order to sustain exemplary damages, that the defendant should have been criminally negligent;⁶ and although, in some cases, it has been held that malice or oppression must be proved,⁷ this is not the general rule.⁸ Allowing damages for wounded feelings, humiliation and the like is not equivalent to exemplary damages.⁹ Where, by reason of the plaintiff's bad character, he suffers only nominal damage, exemplary damages cannot be allowed.¹⁰

⁴ So held in *Chattanooga, etc. R. Co. v. Liddell*, 85 Ga. 482; 11 S. E. 853. There must be, in a personal injury suit, malice or reckless conduct on the part of defendant indicating a purpose to have plaintiff injured, or a reckless disregard of the safety of plaintiff's person, to justify more than compensatory damages (*McHenry Coal Co. v. Snedden*, 98 Ky. 684; 34 S. W. 228). Exemplary damages for personal injuries are recoverable only for negligence of a gross and flagrant character, evincing reckless disregard of human life and safety; and it is error to instruct the jury that such damages are recoverable for "gross negligence," as that term does not necessarily imply the extreme degree of negligence stated (*Florida So. R. Co. v. Hirst*, 30 Fla. 1; 11 So. 506). Exemplary damages cannot be awarded where the degree of care exercised is but slightly below ordinary care (*Missouri Pac. R. Co. v. Shuford*, 72 Tex. 165; 10 S. W. 408; *Philadelphia Tr. Co. v. Orbann*, 119 Pa. St. 37; 12 Atl. 816).

⁵ *Pittsburgh, etc. R. Co. v. Lyon*, 123 Pa. St. 140; 16 Atl. 607 [wanton disregard of rights]; *Citizens' R. Co. v. Willoeby* [Ind. Sup.], 33 N. E. 627; *Cameron v. Bryan*, 89 Iowa, 214;

56 N. W. 434 [willfully keeping ferocious dog]; *Southern Kans. R. Co. v. Rice*, 38 Kans. 398; 16 Pac. 817 [reckless indifference]. In an action for personal injuries, exemplary damages may be awarded by way of punishment, although the actual injury is purely nominal (*Alabama, etc. R. Co. v. Sellers*, 93 Ala. 9; 9 So. 375). Where a passenger was wrongfully compelled to pay fare a second time, to prevent his being ejected from the train, a judgment for \$500 will not be reversed as excessive (*East Tennessee, etc. R. Co. v. King*, 88 Ga. 443; 14 S. E. 708).

⁶ *Augusta, etc. R. Co. v. Randall*, 79 Ga. 304; 4 S. E. 674; *Louisville, etc. R. Co. v. Wolfe*, 128 Ind. 347; 27 N. E. 606.

⁷ *McFee v. Vicksburg, etc. R. Co.*, 42 La. Ann. 790; 7 So. 720 [malice or oppression necessary]. To similar effect, under a code, *Yerian v. Linkletter*, 80 Cal. 135; 22 Pac. 70.

⁸ *Samuels v. Richmond, etc. R. Co.*, 35 S. C. 493; 14 S. E. 943. To similar effect are all the cases cited in note 5.

⁹ *Shepard v. Chicago, etc. R. Co.*, 77 Iowa, 54; 41 N. W. 564.

¹⁰ *Stacy v. Portland Pub. Co.*, 68 Me. 279; *Adams v. Salina, Kans.* 48 Pac. 918.

But in other cases of nominal damage, this rule has no application.¹¹ A corporation may recover exemplary damages, as well as an individual.¹²

§ 749. Exemplary damages against masters. — A corporation or association, having no power to act except through agents, the negligence of a superintending agent (such as a president, manager or railroad superintendent) must be deemed the negligence of the association itself, for all purposes, including liability for exemplary damages.¹ It is everywhere agreed that a master, whether an individual or a corporation, is not liable in exemplary damages for any act of his servant, for which such servant would not be so liable,² and that he is so liable, if the servant would be, and if the act is one for which the master is liable in any damages, and if he authorized or ratified the act, or had retained the servant, after having notice of his unfitness before the act occurred.³ In the courts of several states, especially of New York, Rhode Island, New

¹¹ Alabama, etc. R. Co. v. Sellers, 93 Ala. 9; 9 So. 375; Parker v. Mise, 27 Ala. 480.

¹² International, etc. R. Co. v. Telephone Tel. Co., 69 Tex. 277; 5 S. W. 517.

¹ Where the governing agents of a corporation, *e. g.*, a vice-president and an assistant general manager, were the parties actually in fault, exemplary damages may be recovered (Denver, etc. R. Co. v. Harris, 122 U. S. 597; 7 S. Ct. 1286; approved, Lake Shore, etc. R. Co. v. Prentice, 147 U. S. 110, 114; 13 S. Ct. 261).

² Townsend v. N. Y. Central R. Co., 56 N. Y. 295; Muckle v. Rochester R. Co., 79 Hun, 32; 29 N. Y. Supp. 732.

³ This is recognized law in all the cases cited. Where a railroad company ratifies the malicious act of its conductor in removing a passenger from a train with unnecessary force, it is liable for exemplary damages (International, etc. R. Co. v. Miller

[Tex. Civ. App.], 28 S. W. 233).

Where a conductor allowed other employees of the company to abuse plaintiff, and the company did not discharge the assailants, but promoted one of them, exemplary damages were allowed (New Orleans, etc. R. Co. v. Burke, 53 Miss. 200). The employment of a known drunken driver is gross negligence; and exemplary damages may be given for injuries caused thereby (Frink v. Coe, 4 Greene [Iowa], 555; Sawyer v. Sauer, 10 Kans. 466). A passenger in a steamboat, injured through the negligence of the master and crew, offered on the trial to show that, while sitting upon the wharf immediately after the injury, he applied to the master for some of his men to assist him into a carriage, who refused, saying that he had enough for his men to do on board. Held, such evidence was admissible (Hall v. Conn. River Steamboat Co., 13 Conn. 319).

Jersey, Delaware, West Virginia, Texas, Wisconsin, California, and finally in the Federal courts, it is settled law that masters of all kinds, including corporations, are not liable for exemplary damages in any other cases.⁴ In the courts of other states, especially Maine, New Hampshire, Maryland, Ohio, Indiana, Illinois, South Carolina, Georgia, Kentucky, Tennessee, Missouri, Kansas, Arkansas and Mississippi, it is held that corporations are liable in exemplary damages for the acts of all their servants, when liable for those acts at all, provided, of course, that the servants would be liable themselves for such damage.⁵ In still other states, such as Alabama, Louisiana,

⁴ "For injuries by the negligence of a servant while engaged in the business of his master, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages, unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Corporations may incur this liability as well as private persons" (Clegghorn v. N. Y. Central R. Co., 56 N. Y. 44). Re-affirmed, as the law of New York, in Kutner v. Fargo, 20 N. Y. Misc. 207; 45 N. Y. Supp. 753. For wrongful arrest of a passenger on a railway train, by the conductor, the railroad company is not liable to punitive damages, in addition to such damages as will compensate the passenger for his outlay and injured feelings, merely on the ground that the conductor's illegal conduct was wanton and oppressive, where it is not shown that he was known to the company to be an unsuitable person, or that it participated in, approved, or ratified his treatment

of the passenger (Lake Shore, etc. R. Co. v. Prentice, 147 U. S. 101; 13 S. Ct. 261). s. p., Hagan v. Providence, etc. R. Co., 3 R. I. 88; Haines v. Schultz, 50 N. J. Law, 481; 14 Atl. 488; McCoy v. Philadelphia, etc. R. Co., 5 Houst. 599; Ricketts v. Chesapeake, etc. R. Co., 33 W. Va. 433; 10 S. E. 801; International, etc. R. Co. v. Garcia, 70 Tex. 207; 7 S. W. 802; Gulf, etc. R. Co. v. Moore, 69 Tex. 157; 6 S. W. 631; Mace v. Reed, 89 Wisc. 440; 62 N. W. 186; Eviston v. Cramer, 57 Wisc. 570; 15 N. W. 760; Craker v. Chicago, etc. R. Co., 36 Wisc. 658; Warner v. Southern Pac. Co., 113 Cal. 105; 45 Pac. 187; Yerian v. Linkletter, 80 Cal. 135; 22 Pac. 70.

⁵ Goddard v. Grand Trunk R. Co., 57 Me. 202; Hanson v. Eastern, etc. R. Co., 62 Id. 84; Belknap v. Boston, etc. R. Co., 39 N. H. 358; Hopkins v. Atlantic, etc. R. Co., 36 Id. 9; Taylor v. Grand Trunk R. Co., 48 Id. 304; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Philadelphia, etc. R. Co. v. Larkin, 47 Md. 155; Baltimore, etc. R. Co. v. Barger, 80 Md. 23; 30 Atl. 560 [conductor's assault]; Atlantic, etc. R. Co. v. Dunn, 19 Ohio St. 162, 590; Jeffersonville, etc. R. Co. v. Rogers, 38 Ind. 116; Citizens' R. Co. v. Willooby, 134 Id. 563; 33 N. E. 627; Ill. Cen-

Michigan and North Carolina, corporations have been held liable in exemplary damages, for the gross negligence of their servants, without discussing the ground of liability.⁶ It is not unconstitutional for a state legislature to impose more than compensatory damages upon a railroad company by way of punishment for its negligence, and to allow the person aggrieved to receive such damages instead of the state.⁷

§ 749a. Damages against municipal corporations.—As a general, if not invariable, rule, exemplary damages are not

tral Co. v. Hammer, 72 Ill. 353; Wabash, etc. R. Co. v. Rector, 104 Ill. 296; Quinn v. South Carolina R. Co., 29 S. C. 381; 7 S. E. 614; Spellman v. Richmond, etc. R. Co., 35 S. C. 475; 14 S. E. 947 [ejection]; Gasway v. Atlanta, etc. R. Co., 58 Ga. 216; Georgia R. Co. v. Dougherty, 86 Ga. 744; 12 S. E. 747; Memphis, etc. Packet Co. v. Nagel, 97 Ky. 9; 29 S. W. 743; Louisville, etc. R. Co. v. Ballard, 85 Ky. 307; Central Pass. R. Co. v. Chatterson, [Ky.], 29 S. W. 18; Travers v. Kansas Pac. R. Co., 63 Mo. 421; Canfield v. Chicago, etc. R. Co., 59 Mo. App. 354; Wheeler, etc. Co. v. Boyce, 36 Kans. 350; 13 Pac. 609; Atchison, etc. R. Co. v. Henry, 55 Kans. 715; 41 Pac. 952; Citizens', etc. R. Co. v. Steen, 42 Ark. 321; Southern Exp. Co. v. Brown, 67 Miss. 250; 7 So. 318. s. p., as to individual masters, Rucker v. Smoke, 37 S. C. 377; 16 S. E. 40. In Oregon, two judges out of three were of this opinion (Sullivan v. Oregon R. Co., 12 Ore. 392; 7 Pac. 508).

⁶ Alabama, etc. R. Co. v. Frazier, 93 Ala. 45; 9 So. 303; Alabama, etc. R. Co. v. Sellers, 93 Ala. 9; 9 So. 375; Western U. Tel. Co. v. Cunningham, 99 Ala. 314; 14 So. 579; Lucas v. Mich. Central R. Co., 56 N. W. 1039; 98 Mich. 1 [but see

Gt. Western R. Co. v. Miller, 19 Mich. 305]; *McFee v. Vicksburg, etc. R. Co.*, 42 La. Ann. 790; 7 So. 720; *Knowles v. Norfolk So. R. Co.*, 102 N. C. 59; 9 S. E. 7; *Holmes v. Carolina, etc. R. Co.*, 94 N. C. 318. Exemplary damages were allowed against a company for the recklessness of a conductor in ejecting a passenger who had a ticket, and money besides, with which he offered to pay fare; the time was after midnight and the place in the midst of tracks and moving trains. The court said: "The corporation is liable for exemplary damages for the act of its servant, done within the scope of his authority, under circumstances which would give such right to the plaintiff as against the servant" (*Lake Shore, etc. R. Co. v. Rosenzweig*, 113 Pa. St. 519). But compare *Keil v. Chartiers Co.*, 131 Pa. St. 466; 19 Atl. 78.

⁷ *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; 6 S. Ct. 110; sustaining a statute in Missouri that railroad corporations shall be liable in "double the amount of all damages which shall be done by its agents, engines or cars, to horses, cattle, etc., . . . occasioned in either case by the failure to construct or maintain cattle-guards" (*Mo. Laws*, 1875, p. 131).

recoverable from a municipal corporation.¹ The statutes which impose a liability upon towns for injuries caused by defects in their highways, generally limit the recovery to the actual and direct damage to person and property. A party's entire damages, therefore, however disastrous they may be, are not necessarily recoverable.²

§ 750. **Damage to real property.** — In an action for a negligent injury to real property, the rule of damages generally adopted is to allow to the plaintiff the difference between the market value of the land immediately before the injury occurred, and the like value immediately after the injury is complete,¹ or

¹Chicago v. Martin, 49 Ill. 241; Chicago v. Langlass, 52 Id. 256; Chicago v. Kelly, 69 Id. 475; Parsons v. Lindsay, 26 Kans. 426; Barbour county v. Horn, 48 Ala. 577; Bennett v. Marion [Iowa], 71 N. W. 360; see Ehrgott v. New York, 96 N. Y. 264; Wilson v. Granby, 47 Conn. 59.

² Under the Maine statute, a mere loss of one's time, or increase of expenses (Weeks v. Shirley, 33 Me. 271; Brown v. Watson, 47 Id. 161), or loss of the use of property while it is being repaired (McLaughlin v. Bangor, 53 Id. 398), is not recoverable. See Verrill v. Minot, 31 Me. 299; Mason v. Ellsworth, 32 Id. 271; Canning v. Williamstown, 1 Cush. 451; Harwood v. Lowell, 4 Cush. 310; Chidsey v. Canton, 17 Conn. 475; Beecher v. Derby Bridge Co., 24 Id. 491.

¹ This is the general rule (Dwight v. Elmira, etc. R. Co., 132 N. Y. 199; 30 N. E. 398; Evans v. Keystone Gas Co., 148 N. Y. 112; 42 N. E. 513); but by no means an invariable one (Id.; Hartshorn v. Chaddock, 135 N. Y. 116; 31 N. E. 997; Lentz v. Carnegie, 145 Pa. St. 612; 23 Atl. 219). The measure of damages occasioned by backing water on land, is the difference between what the

property would have sold for before the injury and what it would have brought when the injury is complete (Schuylkill Nav. Co. v. Farr, 4 Watts & Serg. 362; Chase v. N. Y. Central R. Co., 24 Barb. 273; Eufaula v. Simmons, 86 Ala. 515; 6 So. 47; Kankakee, etc. R. Co. v. Horan, 131 Ill. 288; 23 N. E. 621; Louisville, etc. R. Co. v. Sparks, 12 Ind. App. 410; 40 N. E. 546; Noe v. Chicago, etc. R. Co., 76 Iowa, 360; 41 N. W. 42; Willitts v. Chicago, etc. C. R. Co., 88 Iowa, 281; 55 N. W. 313; Illinois Cent. R. Co. v. Miller, 68 Miss. 760; 10 So. 61 [no more]. Crops destroyed may also be allowed (Young v. Gentis, 7 Ind. App. 199; 32 N. E. 796; Fremont, etc. R. Co. v. Harlin, Neb. ; 70 N. W. 263). The same rule applies to diverting water from land (Southern Marble Co. v. Darnell, 94 Ga. 231; 21 S. E. 531); to the permanent destruction of an irrigation ditch (Denver, etc. R. Co. v. Dotson, 20 Colo. 304; 38 Pac. 322); and to fires running over land (Greenfield v. Chicago, etc. R. Co., 83 Iowa, 270; 49 N. W. 95; Baltimore, etc. R. Co. v. Countryman, 16 Ind. App. 139; 44 N. E. 265; Chicago, etc. R. Co. v. Smith, 6 Ind. App. 262; 33 N. E. 241; Ft. Scott, etc. R.

the difference in rental value, where the injury is only temporary,² and not to take into consideration the cost of repairing the injury so as to replace the land in its former condition.³ But

Co. v. Tubbs, 47 Kans. 630; 28 Pac. 612; Flannery v. St. Louis, etc. R. Co., 44 Mo. App. 396). The measure of damages in an action by heirs for injury to their reversionary estate caused by the cutting of timber is the damage to the estate through the destruction of the trees, and not the value of the timber cut (Lowery v. Rowland, 104 Ala. 420; 16 So. 88).

² Ferguson v. Firmenich Mfg. Co., 77 Iowa, 576; 42 N. W. 448 [pollution of stream]. The proper measure of damages for the diversion of the waters of a spring from a tannery is the diminution of rental value during the diversion (Colrick v. Swinburne, 105 N. Y. 503; 12 N. E. 427; adopting the rule laid down in Francis v. Schoellkop, 53 N. Y. 152; and Cassidy v. LeFevre, 45 Id. 562). s. p., South Bend v. Paxon, 67 Ind. 228; and so as to overflow (Kansas City, etc. R. Co. v. Cook, 57 Ark. 337; 21 S. W. 1066). The diminution of rental value caused by smoke and cinders from a railroad engine is the measure of damages (Cogswell v. N. Y., New Haven, etc. R. Co., 103 N. Y. 10; 8 N. E. 537). So held, in case of the neglect of a railroad to fence its track as required by statute (Emons v. Minneapolis, etc. R. Co., 38 Minn. 215; 36 N. W. 340). So held, as to temporary obstruction of access to real estate (Bannon v. Romiser,

Ky. ; 35 S. W. 230; Jackson v. Kiel, 13 Colo. 378; 22 Pac. 504). See French v. Conn. River Lumber Co., 145 Mass 261; 14 N. E. 113 [injury to business allowed]. In an action to recover damages for the overflow of plaintiff's lands whereby his crops were destroyed, the meas-

ure of damages should be the yearly value of the land *for cultivation* and not the yearly rental (Georgia R. Co. v. Berry, 78 Ga. 744; 4 S. E. 10). The damages recoverable from the state for injury to a building by leakage of water from a canal may include the expense necessary to repair the damages occasioned to the building by the water as well as the actual loss of rental value (Connor v. State, 152 N. Y. 40; 46 N. E. 1145; Slavin v. State, 152 N. Y. 45; 46 N. E. 321).

³ In an action to recover for the falling in of land consequent on the excavation of adjoining land by defendant, "the measure of damages is not what it would cost to restore the lot to its former situation, or to build a wall to support it, but what the lot is diminished in value by reason of the acts of the defendant" (McGuire v. Grant, 25 N. J. Law, 356; Moellering v. Evans, 121 Ind. 195; 22 N. E. 989). s. p., as to overflowing land (Robinson v. Shanks, 118 Ind. 125; 20 N. E. 713) and as to fire (Hamilton v. Des Moines, etc. R. Co., 84 Iowa, 131; 50 N. W. 567). Compare, where trees were of special value (Leiber v. Chicago, etc. R. Co., 84 Iowa, 97; 50 N. W. 547). Where, by negligence of A. in building his house adjoining that of B., the latter house is thrown down, A. is liable only for the value of the old house and not for the whole expense of building a new one (Lukin v. Goddall, Peake's Add. Cases 15). The same test was applied where the water running into the plaintiff's mill was choked with tan bark, etc. (Honsee v. Hammond, 39 Barb. 89).

where the injury could have been repaired at an expense much less than the depreciation in the market value of the whole land, the plaintiff has only been allowed to recover the expense of such repair,⁴ with compensation for loss of use;⁵ and, on the other hand, where growing trees or crops were destroyed by a fire, originating in sparks dropping from the defendant's locomotive, the plaintiff was allowed to recover the value of the trees or crops apart from the land,⁶ and so also as to any structure burned in the same way.⁷ The rule was once stated to be: "that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained, without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruc-

⁴ *Terry v. New York*, 8 Bosw. 504; *Doss v. Billington*, Tenn. ; 39 S. W. 717 [ditches]; *Elgin Hyd. Co. v. Elgin*, 74 Ill. 433; *Waters v. Greenleaf Co.*, 115 N. C. 648; 20 S. E. 718. Compare *Koch v. Sackman Inv. Co.*, 9 Wash. 405; 37 Pac. 703.

⁵ *Dwight v. Elmira, etc. R. Co.*, 132 N. Y. 199; 30 N. E. 398.

⁶ The measure of damages for the destruction by fire of growing timber, the value of the land not being affected thereby, is the actual value of the timber as it stood before its destruction (*Central R. Co. v. Murray*, 93 Ga. 156; 20 S. E. 129; *Carnier v. Chicago, etc. R. Co.*, 43 Minn. 375; 45 N. W. 713; *Stoner v. Texas, etc. R. Co.*, 45 La. Ann. 115; 11 So. 875 [fruit trees]; *Burdick v. Chicago, etc. R. Co.*, 87 Iowa, 384; 54 N. W. 439; *Johnson v. Chicago, etc. R. Co.*, 77 Iowa, 666; 42 N. W. 512 [hay]). *s. p.*, *Kansas City, etc. R. Co. v. Rogers*, 48 Neb. 653; 67 N. W. 602; *Bailey v. Chicago, etc. R. Co.*, 3 S. Dak. 531; 54 N. W. 596; *Fremont, etc. R. Co. v. Crum*, 30 Neb. 70; 46 N. W. 217. *s. p.*, as to a

hedge (*Muldrow v. Missouri, etc. R. Co.*, 62 Mo. App. 431); as to growing crops (*Fremont, etc. R. Co. v. Marley*, 25 Neb. 138; 40 N. W. 948; *Sabine, etc. R. Co. v. Smith*, 73 Tex. 1; 11 S. W. 123); as to grass (*Byrne v. Minneapolis, etc. R. Co.*, 38 Minn. 212; 36 N. W. 339; *Galveston, etc. R. Co. v. Horne*, 69 Tex. 643; 9 S. W. 440). But the injuries to the soil may be allowed in addition (*Ft. Worth, etc. R. Co. v. Wallace*, 74 Tex. 581; 12 S. W. 227; *Gulf, etc. R. Co. v. Pool*, 70 Tex. 713; 8 S. W. 535).

⁷ So held as to a house (*Burke v. Louisville, etc. R. Co.*, 7 Heisk. 451; *Atchison, etc. R. Co. v. Huitt*, 1 Kans. App. 788; 41 Pac. 1051; *White v. Chicago, etc. R. Co.*, 1 S. Dak. 320; 47 N. W. 146). The measure of damages for the destruction of a highway bridge is the amount which the town would necessarily expend in repairing or restoring it (*Ft. Covington v. United States, etc. R. Co.*, 8 N. Y. App. Div. 223; 40 N. Y. Supp. 313).

tion.”⁸ This rule has been in the main approved; although its application in that case to fruit trees has been condemned and its application otherwise limited.⁹ More recently, it has been held, “that when the reasonable cost of repairing the injury or restoring the land to its former condition is less than . . . the diminution in the market value . . . such cost of restoration is the proper measure of damages. On the other hand, when the cost of restoring is more than such diminution, the latter is generally the true measure of damages.”¹⁰ Therefore evidence is admissible to show what would have been the damage upon either theory; since, until the evidence was all in, the court could not tell which rule ought to be applied.¹¹ Where water used for drinking purposes has been spoiled, the owner may recover compensation for the expense of procuring other water fit for the same use.¹² If a certain portion of the damage must have befallen the plaintiff in any event, that portion must be deducted from the amount otherwise recoverable from the defendant.¹³

⁸ Per Johnson, J., *Whitbeck v. N. Y. Central R. Co.*, 36 Barb. 644.

⁹ *Dwight v. Elmira, etc. R. Co.*, 132 N. Y. 199; 30 N. E. 398. Therefore, in an action to recover damages for the destruction of fruit trees by fire caused by negligence, evidence of the value of the standing trees is inadmissible (*Haskell v. No. Adirondack R. Co.*, 74 Hun, 380; 26 N. Y. Supp. 595). But compare *Norfolk, etc. R. Co. v. Bohannon*, 85 Va. 293; 7 S. E. 236; apparently *contra*. The measure of damages for cutting a shade tree is the difference between the value of the land before the tree was cut and afterwards (*Edsall v. Howell*, 86 Hun, 424; 33 N. Y. Supp. 892).

¹⁰ *Hartshorn v. Chaddock*, 135 N. Y. 116; 31 N. E. 997. And therefore proof as to the cost of restoring the land, and of the diminution in its market value, is alike admissible in an action for damages, as either measure is likely to obtain, accord-

ing as the one or the other is found to be the less (*Id.*). See more fully, *Sedgw. Dam.*, §§ 932, 939, 947, etc. To similar effect, *Eshleman v. Mar-tic*, 152 Pa. St. 68; 25 Atl. 178.

¹¹ *Hartshorn v. Chaddock, supra*. In an action for negligently causing an overflow of plaintiff's lands, by means of which sand was deposited thereon, evidence of the cost of removing the sand is admissible (*Trinity, etc. R. Co. v. Schofield*, 72 Tex. 496; 10 S. W. 575). Applied to timber (*Stertz v. Stewart*, 74 Wisc. 160; 42 N. W. 214).

¹² *Ottawa Gas Co. v. Graham*, 28 Ill. 73.

¹³ A railway embankment pent up the flood-waters of a river and caused them to flow over land of the plaintiff, doing injury to a certain amount. Had the embankment not been constructed, the waters would have flowed a different way, but would have reached plaintiff's land, and would have done damage to a

§ 751. **Damage to personal property.** — In an action for negligent injury to, or loss of, personal property, the plaintiff is entitled to recover upon much the same principles as those which have been stated in respect to real property. Where a chattel has been totally lost to him, he should recover its full value, according to the market rates current at the time of the loss,¹ if it is a thing ordinarily bought and sold on the market; and partial loss should be estimated on the same basis, allowing a due proportion of the value. In case there is no local market value for the chattel, the value is properly fixed by the value at the nearest market, deducting the cost of transportation.² No subsequent rise or fall of price, or prospective development, as in the case of growing crops, should be regarded.³ And even if the article is intrinsically worthless, yet if it had a fair market value at the time of its loss or injury, that price must govern; but where the price is a purely speculative one, put upon the thing by a few persons combining together, it furnishes no criterion for the measure of damages.⁴ The value of the use of an article, during the

less amount. Held, that the measure of damages recoverable was the difference only between the two amounts (*Workman v. Great Northern R. Co.*, 32 L. J. [Q. B.] 279).

¹ *St. Louis, etc. R. Co. v. Lyman*, 57 Ark. 512; 22 S. W. 170; *Colorado Land Co. v. Hartman*, 5 Colo. App. 150; 38 Pac. 62 [crops]. Where a hired slave loses his life through the negligence of the hirer, the owner is entitled to the full value. A jury cannot legally give a less sum by an arbitrary assessment (*Wise v. Freshley*, 3 McCord, 547). Compare *O'Neil v. South Carolina R. Co.*, 9 Rich. Law, 465. It was held correct to charge the jury that the measure of damages for property lost by the fault of a ferryman in its transportation is the value of the property, with compensation for the actual expenses and loss of time caused by the detention on account of the accident (*Evans v. Rudy*, 34 Ark. 333). Interest should be added (*St.*

Louis, etc. R. Co. v. Lyman, 57 Ark. 512; 22 S. W. 170). No interest should be allowed before judgment (*Galveston, etc. R. Co. v. Downey* [Tex. Civ. App.], 28 S. W. 109).

² *Eddy v. Lafayette*, 4 U. S. App. 247; 1 C. C. A. 441; 49 Fed. 807; *Watt v. Nevada Central R. Co.* [Nev.], 44 Pac. 423.

³ *Texas, etc. R. Co. v. Bayliss*, 62 Tex. 570; *St. Louis, etc. R. Co. v. Yarrowborough*, 56 Ark. 612; 20 S. W. 515; limited in *St. Louis, etc. R. Co. v. Lyman*, 57 Ark. 512; 22 S. W. 170.

⁴ Plaintiff delivered to defendant about 5,000 mulberry trees for carriage, and on the way they were damaged. Held, that the measure of damages was their market price at the time of the injury, even though subsequent experience showed that the market price was based upon imaginary ideas: their real value being little or nothing (*Smith v. Griffith*, 3 Hill, 333).

period occupied in its repair, may be allowed,⁵ not exceeding, however, the value of the thing itself. Reasonable damages, exceeding the market price, may be allowed for the loss of a chattel having a peculiar value to the plaintiff. But such damages are allowed with much caution, and only when clearly proved to be required by justice.⁶ Where chattels are injured, but not wholly destroyed, the measure of damages is the difference between the value of the chattels immediately before and immediately after the injury.⁷ As a general rule, the full value of a chattel is the utmost amount that can be recovered for its loss: and where that value is allowed, nothing can be added for the expense of procuring a temporary substitute,⁸ or for loss of its use meantime.⁹

§ 752. **Damage to animals.** — Where an animal intended only for food is negligently killed, the measure of damages is the difference between its value when living and the value of the dead body as food.¹ But in cases of injury to animals not intended merely for food, or not ready to be used at once for that purpose, the plaintiff ought to recover for expenses

⁵ *Wheeler v. Townshend*, 42 Vt. 15; *The Transit*, 4 Benedict, 138; *Albert v. Bleeker Street, etc. R. Co.*, 2 Daly, 389; *Travis v. Pierson*, 43 Ill. App. 579.

⁶ This is what is called, in equity, the *pretium affectionis*. It cannot be allowed, generally speaking, for a horse (*Bullington v. Newport News, etc. Co.*, 32 W. Va., 436; 9 S. E. 876).

⁷ *Fidelity Co. v. Seattle*, 16 Wash. 445; 47 Pac. 963 [glass]; *Chicago, etc. R. Co. v. Metcalf*, 44 Neb. 848; 63 N. W. 51; *Krebs Mfg. Co. v. Brown*, 108 Ala. 508; 18 So. 659. This may sometimes amount to the entire value (*Id.*). So held, as to animals (*Fritts v. N. Y. & New England R. Co.*, 62 Conn. 503; 26 Atl. 347; *Reed v. Rome, etc. R. Co.*, 48 Hun, 231).

⁸ *Edwards v. Beebe*, 48 Barb. 106; see *Russell v. Roberts*, 3 E. D. Smith, 318.

⁹ *Gillett v. Western R. Co.*, 8 Allen, 560; *Atlanta Oil Mills v. Coffey*, 80 Ga. 145; 4 S. E. 759.

¹ *Boing v. Raleigh & Gaston R. Co.*, 91 N. C. 199; approving *Roberts v. Richmond, etc. R. Co.*, 88 N. C. 560. Where an animal is so badly injured by a train of cars that it must soon die, and the railroad company is liable therefor, and the owner kills the animal, but receives no benefit from it after the injury, evidence of its value after the injury is not admissible for the purpose of reducing damages (*Indianapolis, etc. R. Co. v. Mustard*, 34 Ind. 50). Where cattle are injured by delay and unsafe methods of transportation, the consequent depreciation of their market value in their proper market is the basis for estimating damages (*Leonard v. Fitchburg R. Co.*, 143 Mass. 307; 9 N. E. 667).

reasonably incurred in efforts to cure them, in addition to the depreciation in their value, or to their whole value, where they are finally lost.² The law would be inhuman in its tendency if it should prescribe a different rule, even where the animal eventually dies; since it would then offer an inducement to the owner to neglect its sufferings. In other respects, the rules as to personal property generally apply.

§ 753. Damages against attorneys. — Where an attorney is chargeable with negligence, an action lies immediately; though probably in that event only nominal damages could be proved or recovered.¹ On the other hand, the proof of actual damages may extend to facts growing out of the injury, even up to the day of the verdict.² The damages do not necessarily extend to the nominal amount of the debt lost by the attorney's negligence, but only to the loss actually sustained.³ An attorney, liable for a debt lost by his negligence, is not of course, liable for the loss of the evidence of the debt; and, in

* A traveler's horses were injured through a defect in a bridge: Held, that he was entitled to recover, in addition to the value of the horses, for the prudent expenditure of money in order to effect a cure (*Watson v. Lisbon Bridge Co.*, 14 Me. 201; *Sullivan Co. v. Arnett*, 116 Ind. 438; 19 N. E. 299); but such damages must be specially pleaded (*Patton v. Libbey*, 32 Me. 378). S. P. as to other live stock (*St. Louis, etc. R. Co. v. Biggs*, 50 Ark. 169; 6 S. W. 724). In a similar action in Massachusetts the rule was stated to be that the plaintiff was entitled to recover the diminution, occasioned by the injury, in the market value of the horse at the commencement of the action, and, in addition, such sums as plaintiff had paid out in reasonable attempts to cure him, with a reasonable compensation for his services in attempting to cure him, and a reasonable sum as compensation for the loss of the use of the horse while under such treatment, provided that

the whole damage allowed did not exceed the value of the horse (*Gillett v. Western R. Co.*, 8 Allen, 560). The cost of hiring another horse and carriage may be allowed, if that was the most reasonable course to pursue (*Johnson v. Holyoke*, 105 Mass. 80).

¹ When a person wishing to purchase land retains an attorney to examine the title, and such attorney falsely reports to him that the title is good, and that it would be safe to purchase, a right of action immediately accrues to the client; if no special damage or injury has resulted, nominal damages are recoverable (*Lily v. Boyd*, 72 Ga. 83).

² *Wilcox v. Plummer*, 4 Peters, 173; and see *Marzetti v. Williams*, 1 Barn. & Ad. 415.

³ *Arnold v. Robertson*, 3 Daly, 298; *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 2 Chip. 117; see *Jones v. Lewis*, 9 Dowl. P. C. 143.

a suit against him for such loss, he may show that the plaintiff had another remedy which he has successfully pursued.⁴ The existence of the debt, alleged to have been lost by the attorney's negligence, must of course be proved by competent evidence.⁵

§ 753a. Telegraph damages.—The damages recoverable for neglect to deliver telegrams promptly or at all, must, as in other cases, be a proximate result of the neglect,¹ reasonably certain to have been such result² and reasonably ascertainable.³ Remote, uncertain and merely speculative damages cannot be recovered.⁴ But this does not mean that no

⁴Huntington v. Rumnill, 3 Day, 390.

⁵Russell v. Palmer, 2 Wils. 325; Robinson v. Ward, 2 Carr. & P. 59; see 2 Greenl. on Ev., § 148.

¹Lowery v. Western U. Tel. Co., 60 N. Y. 198 [embezzlement, not mistake in telegram, real cause]; Frazer v. Western U. Tel. Co., 84 Ala. 487; 4 So. 831; Smith v. Western U. Tel. Co., 83 Ky. 104 [peculiar stock transactions case: damages not natural result of negligence]; Stafford v. Western U. Tel. Co., 73 Fed. 273 [social telegram].

²Hartstein v. Western U. Tel. Co., 89 Wisc. 531; 62 N. W. 412 [no proof that plaintiff would have acted on telegram]; Meggett v. Western U. Tel. Co., 69 Miss. 198; 13 So. 815 [telegram to ship produce at a certain price, no proof that addressee would have made shipment if he had received message]; Walser v. Western U. Tel. Co., 114 N. C. 440; 19 S. E. 366 [loss of office]; Manier v. Western U. Tel. Co., 94 Tenn. 442; 29 S. W. 732 [delay in attachment]; Western U. Tel. Co. v. Kendzora, 77 Tex. 257; 13 S. W. 986 [message summoning physician to attend plaintiff's wife, who died, no evidence that her life could have been saved had the message been promptly delivered].

s. P., as to a horse (Duncan v. Western U. Tel. Co., 87 Wisc. 173; 58 N. W. 75; Central U. Tel. Co. v. Swoveland, 14 Ind. App. 341; 42 N. E. 1035).

³Western U. Tel. Co. v. Smith, 76 Tex. 253; 13 S. W. 169.

⁴First Nat. Bank v. Western U. Tel. Co., 30 Ohio St. 555; Western U. Tel. Co. v. Watson, 94 Ga. 202; 21 S. E. 457 [no recovery for what might perhaps have happened]; Chapman v. Western U. Tel. Co., 90 Ky. 265; 13 S. W. 880 [similar case]; Cahn v. Western U. Tel. Co., 2 U. S. App. 24; 1 C. C. A. 107; 48 Fed. 810 [loss of profits on intended "short" sale not allowed: no transaction being had]. On failure to deliver a message instructing purchase for plaintiff of certain stock, the fact that within a few days after the message was sent the price of such stock advanced \$550, and so continued until suit was brought, does not entitle plaintiff to recover more than nominal damages, where there is no evidence that, if the stock had been purchased, plaintiff would have ever sold it at a profit (Western U. Tel. Co. v. Fellner, 58 Ark. 29; 22 S. W. 917). Defendant was negligent in transmitting a telegram announcing a rise in the price of cotton, whereby plaintiffs sold

damages can ever be recovered for actual loss upon a speculative transaction; for they are recoverable.⁵ On the other hand, speculative reasons for supposing that the plaintiff would not have benefited by the proper transmission of the message cannot lessen the damages.⁶ There can be no recovery for the loss of opportunities to enter into illegal transactions,⁷ or of any benefits which the plaintiff could not accept without a breach of duty, whether that duty be imposed by law or created by his own contract.⁸ The loss of a contract, void by the statute of frauds, cannot justify more than nominal damages.⁹ Under the general rule that ordinary

their cotton for less than they could have obtained. But as the sender was under no legal obligation to inform plaintiffs as to the price of cotton, and plaintiffs did not rely on receiving information from him, held, that the damages claimed were too remote (*Frazer v. Western U. Tel. Co.*, 84 Ala. 487; 4 So. 831). Where plaintiff deposited money with defendant, to be transmitted to a bank for the payment of plaintiff's note due on that day, but because of defendant's failure to notify the bank until the day following the note went to protest, held that, in the absence of pecuniary loss resulting from defendant's failure, plaintiff could not recover for damages to his credit (*Smith v. Western U. Tel. Co.*, 150 Pa. St. 561; 24 Atl. 1049). *s. p.*, *Western U. Tel. Co. v. Brown*, 62 Tex. 536. Damages for bruises received in consequence of being obliged to take a rough vehicle, are too remote on failure to transmit a message ordering the family carriage (*McAllen v. Western U. Tel. Co.*, 70 Tex. 243; 7 S. W. 715). Damages cannot be recovered, based on the probability of plaintiff's horse being able to win at a trotting race (*Western U. Tel. Co. v. Crall*, 39 Kans. 590; 18 Pac. 719). Certain damages held not contingent

or uncertain (*Western U. Tel. Co. v. Bowen*, 84 Tex. 476; 19 S. W. 554).

⁵ *Pearsall v. Western U. Tel. Co.*, 124 N. Y. 256; 26 N. E. 534; and other cases cited in § 755, *post*.

⁶ Plaintiff's message, directing purchase by C. was delayed. Another person had also sent a message instructing C. to buy the property for him. If both messages had been transmitted without delay, the latter would have reached C. first, and plaintiff would have lost his opportunity to purchase. Held, that this was no defense to plaintiff's action (*Alexander v. Western U. Tel. Co.*, 67 Miss. 386; 7 So. 280).

⁷ Contracts for fictitious "futures," being illegal, cannot be a basis of damages (*Cothran v. Western U. Tel. Co.*, 83 Ga. 25; 9 S. E. 836; *Gist v. W. U. Tel. Co.*, 45 S. C. 344; 23 S. E. 143; *W. U. Tel. Co. v. Harper*, [Tex.] 39 S. W. 599).

⁸ No recovery for failure to deliver a message offering employment when the addressee was already under contract with another, consistently with which he could not have entered the employment (*Freeman v. Western U. Tel. Co.*, 93 Ga. 230; 18 S. E. 647).

⁹ *Merrill v. Western U. Tel. Co.*, 78 Me. 97.

care must be used by the injured party to avoid and mitigate damage,¹⁰ the plaintiff cannot recover for damages which he could have avoided by sending a second telegram, if the delay in answering his first was such as would have induced a man of ordinary prudence to send a second telegram.¹¹

§ 754. Telegraph damages limited by want of notice.—Although, in the absence of prevailing authority to the contrary, it would seem just to say that a telegram may always be presumed to be of importance, and that the law ought not to sanction negligence on the part of a telegraph company, in proportion as a message may appear to be unimportant; yet it is now settled in a majority of the courts that only the cost of the message can be recovered for failure to transmit a message promptly and correctly, unless the telegrapher had notice, from the message itself, or from information furnished with it, that its non-delivery would probably be attended with other damages.¹ The principle thus applied is precisely the same as that established as to common carriers of merchandise, that such damages as could not have been anticipated, by a prudent

¹⁰ See § 741, *ante*.

¹¹ *Gulf, etc. R. Co. v. Loonie*, 82 Tex. 323; 18 S. W. 221.

¹ A telegraph company is not liable to the sender of a message for losses on purchases of wool caused by a mistake in transmitting it, where it was in cipher, wholly unintelligible to the company and its agents, and they were not informed of the nature, importance, or extent of the transaction to which it related, or of the probable consequences, if it were transmitted incorrectly, although they knew that the sender was a wool merchant, and that the person addressed was in his employ (*Primrose v. Western U. Tel. Co.*, 154 U. S. 1; 14 S. Ct. 1098). To same effect, *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 54 Barb. 505; *Leonard v. N. Y., etc. Tel. Co.*, 41 N. Y. 544; *Western U. Tel. Co. v. Martin*, 9 Bradw. 587; *Candee v. Western U. Tel. Co.*, 34

Wisc. 471; *McKay v. Western U. Tel. Co.*, 16 Nev. 222; *Daniel v. Western U. Tel. Co.*, 61 Tex. 432; *Western U. Tel. Co. v. Lively*, Tex. ; 15 S. W. 197; *Behm v. Western U. Tel. Co.*, 8 Biss. 131; *First Nat. Bank v. Western U. Tel. Co.*, 30 Ohio St. 555; *Cannons v. Western U. Tel. Co.*, 100 N. C. 300; 6 S. E. 731; *Hill v. Western U. Tel. Co.*, 42 S. C. 367; 20 S. E. 135; *Western U. Tel. Co. v. Wilson*, 14 So. 1; 32 Fla. 527 [overruling *Same v. Hyer*, 23 Fla. 637; 1 So. 129]; *Western U. Tel. Co. v. Clifton*, 68 Miss. 307; 8 So. 746; *Abeles v. Western U. Tel. Co.*, 37 Mo. App. 554). The contrary rule is established in *Virginia* (*Western U. Tel. Co. v. Reynolds*, 77 Va. 173); *Georgia* (*Western U. Tel. Co. v. Fatman*, 73 Ga. 285); *Alabama* (*Daughtery v. American U. Tel. Co.*, 75 Ala. 178; s. c. again, 89 Ala. 191; 7 So. 660).

business man, as a natural and probable consequence of the breach, are not to be recovered; and, therefore, pecuniary contingencies which depend on the prompt and accurate transmission of the message must, in some way, be brought to the notice of the telegrapher, sufficiently to put him on his guard, in order to make them a ground for recovery.² If the message does give such notice, the liability to full compensation for damages accrues, in case of negligence.³ It is not necessary that such notice should be full or explicit. It is sufficient if it gives reasonable warning, such as would put a prudent person upon diligence.⁴ There is no doubt of the right to

* *Western U. Tel. Co. v. Short*, 53 Ark. 434; 14 S. W. 649. This principle, which was established, though imperfectly stated, in the case of *Hadley v. Baxendale* (9 Exch. 341), and is better stated in *Ehrgott v. New York* (96 N. Y. 204) and other recent cases, will be found more fully illustrated in the law of contracts and in the law of carriers.

³ A telegraph company must take notice of the purposes for which a message was sent, as disclosed by the language therein (*Western U. Tel. Co. v. Coffin*, 88 Tex. 94; 30 S. W. 896). Where the contents of a dispatch indicate the necessity of its prompt delivery, the company is liable for damages proximately arising from failure to deliver with reasonable promptness (*Hadley v. Western U. Tel. Co.*, 115 Ind. 191; 15 N. E. 845; *Brown v. Western U. Tel. Co.*, 6 Utah, 219; 21 Pac. 988).

⁴ *Bierhaus v. Western U. Tel. Co.*, 8 Ind. App. 246; 34 N. E. 531; *Western U. Tel. Co. v. Short*, 53 Ark. 434; 14 S. W. 649; *Western U. Tel. Co. v. Carter*, 85 Tex. 580; 22 S. W. 961. A telegraph company is not relieved from liability for special damage resulting from delay in delivering a message, which prevented plaintiff from entering into certain contracts, by

the fact that it had no notice of the contracts or the damages liable to arise from such delay (*Gulf, etc. R. Co. v. Loonie*, 82 Tex. 323; 18 S. W. 221). Where the subject to which a telegram relates (as a proposition to sell goods at a given rate) is understood by the company, it is not necessary, in order to make it liable in compensatory damages for negligence in transmission, that the company should be able to foresee the exact amount of pecuniary loss which such negligence is likely to cause (*Pepper v. Western U. Tel. Co.*, 3 Pickle, 554; 11 S. W. 783); practically overruling *Beaupre v. Pacific, etc. Tel. Co.*, 21 Minn. 155. In *Rittenhouse v. Independent Tel. Co.* (1 Daly, 474; *aff'd*, 44 N. Y. 263), it was held that a telegraph company was liable for a loss on five hundred shares, where only five were telegraphed for, it appearing to be usual thus to abridge messages between brokers. *S. P., Bryant v. American Tel. Co.*, 1 Daly, 575. For examples of messages held sufficiently explicit, see *Mowry v. Western U. Tel. Co.*, 51 Hun, 126; 4 N. Y. Supp. 666; *Western U. Tel. Co. v. Eskridge*, 7 Ind. App. 208; 33 N. E. 238; *Western U. Tel. Co. v. Lowrey*, 32 Neb. 732; 49 N. W. 707; *Western U. Tel. Co. v. Linn*, 87

recover full damages if the telegrapher is duly warned, although the message itself contains no sufficient warning of its importance. Hence, even in the courts which hold with the majority, substantial damages can be recovered in respect to an unintelligible cipher message, if the operator was expressly warned of its importance.⁵ But it is not necessary that express warning should be given, if the operator is or ought to be otherwise aware of the fact.⁶ It is now settled that the information need not go into particulars; it is enough if the effect and general nature of the importance of the message is apparent or communicated.⁷ Abbreviations commonly used in trade, and understood by the telegraph company, do not make a telegram a cipher communication.⁸

§ 755. **Telegraph damages in particular cases.**—Subject to the foregoing limitations, the person addressed may recover his loss by failure to secure employment¹ or commis-

Tex. 7; 26 S. W. 490; *Western U. Tel. Co. v. Sheffield*, 71 Tex. 570; 10 S. W. 752; *Martin v. Western U. Tel. Co.*, 1 Tex. Civ. App. 143; 20 S. W. 860.

⁵ At the time the message, "Hold my case till Tuesday or Thursday," was handed to the operator, he was told of its importance. He neglected to send it; and plaintiff was in consequence obliged to go, with his lawyer, to Buffalo. Held, that the company was liable for the expenses of trip and the counsel fee (*Sprague v. Western U. Tel. Co.*, 6 Daly, 200; *aff'd*, 67 N. Y. 590).

⁶ *Herron v. Western U. Tel. Co.*, 90 Iowa, 129; 57 N. W. 696 [agent knew]; *Postal Cable Co. v. Lathrop*, 131 Ill. 575; 23 N. E. 583 [ought to have been aware]; *Erie Tel. Co. v. Grimes*, 82 Tex. 89; 17 S. W. 831; *Western U. Tel. Co. v. Haman*, 2 Tex. Civ. App. 100; 20 S. W. 1133.

⁷ When the receiving agent knows personally the purpose and urgency of a message, to give him notice thereof would be useless (*Western*

U. Tel. Co. v. Jobe, 6 Tex. Civ. App. 403; 25 S. W. 1036). In *Western U. Tel. Co. v. Fatman* (73 Ga. 285), notice that a cipher message was important was deemed to be implied from the course of business.

⁸ *Pepper v. Western U. Tel. Co.*, 3 Pickle, 554; 11 S. W. 783. See *Rittenhouse v. Ind. Tel. Co.*, 44 N. Y. 263.

¹ *Baldwin v. Western U. Tel. Co.*, 93 Ga. 692; 21 S. E. 212 [failure to transmit message accepting an offer of employment]; *Western U. Tel. Co. v. McKibben*, 114 Ind. 511; 14 N. E. 894; *Western U. Tel. Co. v. Fenton*, 53 Ind. 1; *Western U. Tel. Co. v. Valentine*, 18 Ill. App. 57; *Western U. Tel. Co. v. McKibben*, *supra*; *Western U. Tel. Co. v. Longwill*, 5 N. M. 308; 21 Pac. 339 [physician sent for]. In *Kenyon v. Western U. Tel. Co.* (100 Cal. 454; 35 Pac. 75), it was held that where, by reason of failure to deliver a message, plaintiff failed to receive an appointment as deputy assessor, damages for loss of salary are too speculative,

sions.² Where a favorable market for purchase or sale is lost by an alteration of a message or delay in its delivery, the advance of the market in the former case, and its decline in the latter, is the measure of damages,³ provided an actual transaction is

since a deputy only holds office at the pleasure of the officer appointing him. This seems to us unreasonable. The same fact is true of nine-tenths of persons in private employment.

² A ship-broker lost a commission of \$500, because a message which might have been delivered in five minutes was delayed an hour and a half. The company was held liable for the commission (*Western U. Tel. Co. v. Fatman*, 73 Ga. 285).

³ The proper measure of damages for failure to deliver a telegraphic message containing on its face an instruction to buy a certain stock, that in consequence was not bought until 24 hours later, is the difference between the market value of the stock when the message ought to have been delivered and on the day after (*Pearsall v. Western U. Tel. Co.*, 124 N. Y. 256; 26 N. E. 534; aff'g 44 Hun, 532). It was there proved that the plaintiff's agents were prepared to obey. Held, that the sender could recover the difference; although his purchase was a speculative one. *S. P., U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262. See *Squire v. Western U. Tel. Co.*, 98 Mass. 232; *s. p.*, as to exchange of lands, *Western U. Tel. Co. v. Wilhelm*, 48 Neb. 910; 67 N. W. 870. Where the word *sacks*, in a message from Chicago to Oswego, was changed into *casks*; and so coarse salt was sent instead of fine, and there was no market for it at Chicago, the difference between its market value at Oswego, and what it sold for at Chicago, together with the expense of transportation, held

a proper measure of the damage (*Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544). A principal telegraphed to his brokers, "Buy five Hudson," the brokers knowing that "five" meant 500. By mistake "*Hudson*" was transmitted as *hundred*. Owing to delay in correcting the mistake, plaintiff lost by the advance in the price of the stock, and the company was held liable for the difference on 500 shares (*Rittenhouse v. Independent Tel. Co.*, 44 N. Y. 263; aff'g 1 Daly, 474). In a message to "sell stock for sixty-six," the 66 was changed to 56, and the company was held liable for the difference (*Western U. Tel. Co. v. Cohen*, 73 Ga. 523). A message to plaintiff to "ship his hogs at once" was delayed in delivery for four days. The measure of damages was held to be the difference between the market value of the hogs on the day plaintiff was enabled to place them on the market after receiving the dispatch, and their value on the day, if there had been no delay, he could have got them into market (*Manville v. Western U. Tel. Co.*, 37 Iowa, 214; see *Daugherty v. American U. Tel. Co.*, 75 Ala. 168). Where plaintiff's sale of his horse failed because of the delay, and the horse had no regular market value in the neighborhood, and the plaintiff has since disposed of him for the best price by reasonable effort attainable, plaintiff may recover the difference between the dispatch's offer and the price realized, with cost of keep and interest (*Herron v. Western U. Tel. Co.*, 90 Iowa, 129; 57 N. W. 696).

entered into,⁴ or would certainly have been entered into.⁵ The

⁴ Where an order to an agent to "buy 10,000 barrels of oil, if thought safe," was delayed until the market had closed for the day, and the market opened the next day 18 cents higher, but the agent did not buy. a verdict for \$1,800 was set aside, the court saying in substance: "No transaction was in fact made; and, there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9 and of making a profit by selling on the 10th: the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place. Of course, where the negligence of the telegraph company consists, not in delaying the transmission of a message, but in transmitting a message erroneously, so as to mislead the person to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss, based upon changes in market value, is clearly within the rule for estimating damages. But this has no application to the present case. Here the plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and therefore was not required to pay, and did not pay any advance upon the market price prevailing at the date of the order. Neither does it appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate

resale. If the order had been promptly delivered on the day it was sent, and had been executed on that day, it is not found that he would have sold the next day at the advance, nor that he could have resold at a profit at any subsequent day. The only damage, therefore, which he is entitled to recover is the cost of transmitting the delayed message" (*Western U. Tel. Co. v. Hall*, 124 U. S. 444; 8 S. Ct. 577). Where plaintiff telegraphed to oil merchants, who were in no sense his agents, to "buy in" a quantity of oil on his account, which he had agreed to sell to them, and the telegram was negligently delayed until the price of oil had advanced; held, that he could not recover the difference in price as damages, because there was *no evidence that the oil merchants would have made the purchase on his account* had they received the message in time (*Kiley v. Western U. Tel. Co.*, 39 Hun, 158; *aff'd*, 109 N. Y. 231; 16 N. E. 75). The difference between these cases and those cited in note 3 is perfectly plain. Where the incorrect transmission of a telegram caused plaintiff to sell shares of stock for which he received the market value, his damages are limited to the cost of the message, though, a few days later, he was compelled, in order to buy shares of the same stock, to pay an advanced price (*Hughes v. Western U. Tel. Co.*, 114 N. C. 70; 19 S. E. 100). But *query?* In *Cahn v. W. U. Tel. Co.* (2 U. S. App. 24, 1 C. C. A. 107; 48 Fed. 810), the court refused to allow recovery for loss of a "short" sale, although the addressee would have obeyed the message if received. There, the plaintiff did not either buy or sell.

⁵ Recovery sustained on this

same rule applies to the case of a loss by making a purchase or sale, which certainly would not have been made, had a telegram been properly transmitted.⁶ Where the message was an offer to buy of plaintiff at a certain price; and, in consequence of not receiving it, he sold it to another person at a less price, it was held that he might recover the difference.⁷ But where it was a mere offer to sell to the plaintiff at a certain price, it was held that a subsequent rise did not entitle him to recover more than nominal damages; since it was not certain that he would have accepted the offer.⁸ Where it was an offer to sell at a specified price, which, by the telegrapher's negligence, was altered to a lower price, at which plaintiff had to settle upon the acceptance of the offer, and there was no evidence that he could have obtained the price mentioned in his original message, it was held that the difference could not be recovered; but the true measure of damages should be the difference between the price received and the market value.⁹ Where the message was an offer to sell a small quantity, and by negligence of the company it was written and delivered as for a large quantity, which the plaintiff was then obliged to purchase in order to fulfill the contract, it was held that the measure of damages was the additional cost to which he was thus subjected.¹⁰ Where a number of articles are called for, the company will be liable for the utmost loss which arises from the want of that number of similar articles, whatever may be the price.¹¹ In case of such delay in delivering a telegram directing the commencement of legal proceedings as prevents them from having proper effect, the company will be liable for the amount which might be secured by such pro-

ground in *Western U. Tel. Co. v. James*, 90 Ga. 254; 16 S. E. 83; *Alexander v. W. U. Tel. Co.*, 67 Miss. 386; 7 So. 280.

⁶ *Garrett v. Western U. Tel. Co.*, 83 Iowa, 257; 58 N. W. 1064; *re-affirming s. c.*, 83 Iowa, 257; 49 N. W. 88; *Hollis v. Western U. Tel. Co.*, 91 Ga. 801; 18 S. E. 287.

⁷ *Markel v. Western U. Tel. Co.*, 19 Mo. App. 80. To same effect,

Manville v. Western U. Tel. Co., 37 Iowa, 214.

⁸ *Pennington v. Western U. Tel. Co.*, 67 Iowa, 631; 24 N. W. 45 [judgment for substantial damages reversed].

⁹ *Western U. Tel. Co. v. Shotter*, 71 Ga. 760.

¹⁰ *Tyler v. Western U. Tel. Co.*, 60 Ill. 421.

¹¹ *N. Y. & Washington Tel. Co. v. Dryburg*, 35 Pa. St. 298.

ceedings.¹² But, for delay in delivering a telegram simply directing the payment or receipt of money, interest during the period of delay is all that can be recovered, in any case whatever.¹³ The expense of performing a contract must be deducted from the compensation provided by the contract, in estimating damages.¹⁴ So, where a difference between the price which was actually obtained and that which should have been obtained is allowed, expenses which would have been incurred in obtaining the higher price, but were not incurred in obtaining the lower price, must be deducted from the damages;¹⁵ while, if such expenses are incurred in selling for the lower price, they should be added.¹⁶ Where an error in a telegram induces the addressee to enter into a transaction which would be very profitable, if the telegram were correct, but which the error makes simply unprofitable, with no loss, damages can be only nominal.¹⁷

§ 756. **Social telegrams.**— In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings, which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages.¹ This view

¹² *Parks v. Alta California Tel. Co.*, 13 Cal. 423; *Bryant v. American Tel. Co.*, 1 Daly, 575; *Western U. Tel. Co. v. Sheffield*, 71 Tex. 570; 10 S. W. 752; *Fleischner v. Pacific Cable Co.*, 55 Fed. 738; *Bierhaus v. Western U. Tel. Co.*, 8 Ind. App., 246; 34 N. E. 581.

¹³ *Landsberger v. Magnetic Tel. Co.*, 33 Barb. 530; *Ricketts v. Western U. Tel. Co.*, 10 Tex. Civ. App. 226; 30 S. W. 1105.

¹⁴ *Western U. Tel. Co. v. Robinson* [Tex. Civ. App.], 29 S. W. 71.

¹⁵ *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544; *Western U. Tel.*

Co. v. Crawford, 110 Ala. 460; 20 So. 111 [expense of carrying cotton]; *Western U. Tel. Co. v. Williford*, 2 Tex. Civ. App. 574; 22 S. W. 244 [cost of transportation].

¹⁶ *Western U. Tel. Co. v. Collins*, 45 Kans. 88; 25 Pac. 187; *Western U. Tel. Co. v. Linney* [Tex. Civ. App.], 28 S. W. 234 [cost of freight and keep of cattle].

¹⁷ *Western U. Tel. Co. v. Aubrey*, 61 Ark. 613; 33 S. W. 1063 [offer to buy cotton erroneously made out at high price].

¹ The first decision to this effect was in *Sorelle v. Western U. Tel.*

has been adopted in Texas, Alabama, North Carolina, Kentucky, Tennessee, Indiana and Iowa. But in New York, Georgia, Florida, Mississippi, Missouri, Wisconsin, Minnesota, the Dakotas, Kansas and several of the Federal courts, it has been rejected: those courts holding that in no case of negligence can damages be recovered for mere mental suffering, not accompanied by bodily pain or other visible injury.² Such

Co., 55 Tex. 308, where the *addressee* of the message was allowed to recover. In this respect, the case was overruled in *Gulf, etc. R. Co. v. Levy*, 59 Tex. 563. But the main proposition was re-affirmed, after two arguments, in *Stuart v. Western U. Tel. Co.*, 66 Tex. 580; 18 S. W. 351, and it has ever since been adhered to in Texas (*Western U. Tel. Co. v. Lydon*, 82 Tex. 364; 18 S. W. 701; *Western U. Tel. Co. v. Beringer*, 84 Tex. 38; 19 S. W. 336; *Western U. Tel. Co. v. Nations*, 83 Tex. 539; 18 S. W. 709; *Western U. Tel. Co. v. Smith*, 88 Tex. 9; 30 S. W. 549). It has also been accepted in the other states named (*Western U. Tel. Co. v. Henderson*, 89 Ala. 510; 7 So. 419; *Western U. Tel. Co. v. Cunningham*, 99 Ala. 314; 14 So. 579 [addressee]; *Thompson v. Western U. Tel. Co.*, 107 N. C. 449; 12 S. E. 427; *Young v. Western U. Tel. Co.*, 107 N. C. 370; 11 S. E. 1044 [addressee]; *Sherrill v. Western U. Tel. Co.*, 116 N. C. 655; 21 S. E. 429; *Havener v. Western U. Tel. Co.*, 117 N. C. 540; 23 S. E. 457; *Chapman v. Western U. Tel. Co.*, 90 Ky. 265; 13 S. W. 880; *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695; 8 S. W. 574; *Reese v. Western U. Tel. Co.*, 123 Ind. 294; 24 N. E. 163; *Western U. Tel. Co. v. Newhouse*, 6 Ind. App. 422; 33 N. E. 800; *Western U. Tel. Co. v. Cline*, 8 Ind. App. 364; 35 N. E. 564; *Mentzer v. Western U. Tel. Co.*, 93 Iowa, 752; 62 N. W. 1 [addressee]. As to *Illinois*, see *Logan v. Western U. Tel. Co.*, 84 Ill. 468. The ad-

dressee may, in some cases, recover for mental suffering (*Loper v. Western U. Tel. Co.*, 70 Tex. 689; 8 S. W. 600; *Western U. Tel. Co. v. Kinsley* [Tex. Civ. App.], 28 S. W. 831). Compare *Gulf, etc. R. Co. v. Levy*, 59 Tex. 563.

² *Curtin v. Western U. Tel. Co.*, 13 N. Y. App. Div. 253; 42 N. Y. Supp. 1109; *Chapman v. Western U. Tel. Co.*, 88 Ga. 763; 15 S. E. 901; *Augusta, etc. R. Co. v. Randall*, 85 Ga. 297; 11 S. E. 706 [s. p., in action against carrier of persons]; *International O. Tel. Co. v. Saunders*, 32 Fla. 434; 14 So. 148; *Western U. Tel. Co. v. Rogers*, 68 Miss. 748; 9 So. 823; *Connell v. Western U. Tel. Co.*, 116 Mo. 34; 22 S. W. 345; *Summerfield v. Western U. Tel. Co.*, 87 Wisc. 1; 57 N. W. 973; *Francis v. Western U. Tel. Co.*, 58 Minn. 252; 59 N. W. 1073; *Russell v. Western U. Tel. Co.*, 3 Dak. 315; 19 N. W. 408; *West v. Western U. Tel. Co.*, 39 Kans. 93; 17 Pac. 807; *Western U. Tel. Co. v. Wood*, 6 C. C. A. 432; 57 Fed. 471; *Gahan v. Western U. Tel. Co.*, 59 Fed. 433; *Kester v. Western U. Tel. Co.*, 55 Fed. 603; *Tyler v. Western U. Tel. Co.*, 54 Fed. 634; *Crawson v. Western U. Tel. Co.*, 47 Fed. 544; *Chase v. Western U. Tel. Co.*, 44 Fed. 554; *Butner v. Western U. Tel. Co.* [Okla.], 37 Pac. 1087; *Kester v. Western U. Tel. Co.*, 8 Ohio C. C. 236; *Kline v. Western U. Tel. Co.*, 3 Ohio N. P. 143. But see *contra*, *Beasley v. Western U. Tel. Co.*, 39 Fed. 181.

damages, when allowed, ought not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the notice received by the telegrapher. In short, they must be strictly the proximate result of the injury.³ And attempts to recover damages for "mental suffering" caused by the loss of money⁴ or of credit,⁵ have been everywhere properly rejected.

§ 757. Statutory penalties.—In many states, penalties are imposed by statute for refusal or neglect to accept or transmit telegrams. In Indiana, Arkansas, and perhaps other states, telegraph companies are subject to a statutory penalty of \$100 for a failure, during the usual office hours, to transmit a message with impartiality and good faith, in the order of time in which it is received.¹ The statute casts the burden of explaining a delay upon the company;² but the penalty is not incurred by a delay, where the message duly arrives at the destination office after the usual office hours;³ and only the sender

³ *Western U. Tel. Co. v. Linn*, 87 Tex. 7; 26 S. W. 490; *Ikard v. Western U. Tel. Co.* [Tex. Civ. App.], 22 S. W. 534. For examples of the kind of damages which are *not* allowed under this rule, see *Gulf, etc. Tel. Co. v. Richardson*, 79 Tex. 649; 15 S. W. 699; *Western U. Tel. Co. v. Smith*, 76 Tex. 253; 13 S. W. 169; *Western U. Tel. Co. v. Cooper*, 71 Tex. 507; 9 S. W. 598; *Western U. Tel. Co. v. Carter*, 85 Tex. 580; 22 S. W. 961; *Western U. Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280; 23 S. W. 564; *Western U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125; 32 N. E. 871. Where the failure of a telegraph company to deliver a message prevents the addressee from being present at the funeral of a deceased relative, mental anguish may, without other proof, be inferred from the fact of blood relationship, and is a proper element of damages (*Western U. Tel. Co. v. Coffin*, 88 Tex. 94; 30 S. W. 896; *Western U. Tel. Co. v.*

Randles, Tex. Civ. App. ; 34 S. W. 447 [father]). But in the case of a deceased brother-in-law, mental anguish will not be presumed (*Western U. Tel. Co. v. Coffin*, 88 Tex. 94; 30 S. W. 896). S. P., *Western U. Tel. Co. v. Womack*, 9 Tex. Civ. App. 607; 29 S. W. 933; *Western U. Tel. Co. v. Stone* [Tex. Civ. App.], 27 S. W. 144.

⁴ *Ricketts v. Western U. Tel. Co.*, 10 Tex. Civ. App. 226; 30 S. W. 1105. Compare *Western U. Tel. Co. v. Simpson*, 73 Tex. 423; 11 S. W. 385.

⁵ *Western U. Tel. Co. v. Gidcumb* [Tex. Civ. App.], 28 S. W. 699.

¹ Ind. R. S. [1891], § 4176; Ark. Dig. [1884], § 6419; Little Rock, etc. Tel. Co. v. Davis, 41 Ark. 79.

² *Western U. Tel. Co. v. Scircle*, 103 Ind. 227; 2 N. E. 604.

³ Where a message was received in office hours and promptly transmitted to another office, where it was received in the evening, after office hours and so not delivered until noon of the next day, the com-

of the message can recover the penalty.⁴ A company cannot evade a statutory penalty by means of a condition or stipulation.⁵ Under the Indiana and Missouri statutes, which declare that companies shall be liable for the special damages caused by negligence in the transmission of dispatches, the recipient as well as the sender of the message may maintain an action for damages.⁶ These statutes are constitutionally inapplicable to inter-state telegrams.⁷

§ 758. **Damages for personal injuries.** — In an action for negligent injury to the person of the plaintiff, he may recover the expense of his cure,¹ the value of the time lost by him during his disabilities,² and a fair compensation for the bodily and mental suffering³ caused by the injury, as well as for any

pany was not liable: the office hours at the last office being reasonable (*Western U. Tel. Co. v. Harding*, 103 Ind. 505; 3 N. E. 172).

⁴ *Western U. Tel. Co. v. Kinney*, 106 Ind. 463; 7 N. E. 191.

⁵ *Western U. Tel. Co. v. Adams*, 87 Ind. 598.

⁶ *Ind. R. S* [1881], § 4177; *Mo. R. S* [1879], § 887; *Western U. Tel. Co. v. Fenton*, 52 Ind. 1; *Markel v. Western U. Tel. Co.*, 19 Mo. App. 80.

⁷ *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347; 7 S. Ct. 1126.

¹ *Vicksburg, etc. R. Co. v. Putnam*, 118 U. S. 545; 7 S. Ct. 1; *Sherwood v. Chicago, etc. R. Co.*, 82 Mich. 374; 46 N. W. 773; *Robinson v. Simpson*, 8 *Houst.* 398; 33 *Atl.* 287; *Whelan v. N. Y., Lake Erie, etc. R. Co.*, 38 *Fed.* 15; *Davidson v. Southern Pac. Co.*, 44 *Fed.* 476; *Peoria Bridge Asso. v. Loomis*, 20 *Ill.* 235; *Beardsley v. Swann*, 4 *McLean*, 333; *Oliver v. North Pacific Tr. Co.*, 3 *Oreg.* 84; *Memphis, etc. R. Co. v. Whitfield*, 44 *Miss.* 466. See *Ransom v. N. Y. & Erie R. Co.* 15 *N. Y.* 415; *Metcalf v. Baker*, 57 *Id.* 662; *Sheehan v. Edgar*, 58 *Id.* 631; *Brignoli v. Chicago, etc. R. Co.*, 4 *Daly*, 182; *Phillips v. South-*

western R. Co., L. R. 4 Q. B. Div. 406.

² *Wade v. Leroy*, 20 *How. U. S.* 34; *Dist. Columbia v. Woodbury*, 136 *U. S.* 450; 10 *S. Ct.* 990; *Vicksburg, etc. R. Co. v. Putnam*, 118 *U. S.* 545; 7 *S. Ct.* 1; *Penn., etc. Canal Co. v. Graham*, 63 *Pa. St.* 290; *Walker v. Erie R. Co.*, 63 *Barb.* 260; *Phillips v. Southwestern R. Co.*, *supra*; *Memphis, etc. R. Co. v. Whitfield*, 44 *Miss.* 466; *Peoria Bridge Assoc. v. Loomis*, 20 *Ill.* 235; *Kinney v. Folkerts*, 84 *Mich.* 616; 48 *N. W.* 283; *Chicago, etc. R. Co. v. Starmer*, 26 *Neb.* 630; 42 *N. W.* 706. Plaintiff cannot recover for his own loss of time and capacity to labor, and in addition what he has to pay another to supply that loss of labor (*Blackman v. Gardiner Bridge*, 75 *Me.* 214).

³ Bodily pain is always allowed as a basis of damages (*Vicksburg, etc. R. Co. v. Putnam*, 118 *U. S.* 545; 7 *S. Ct.* 1; *Pennsylvania R. Co. v. Wilson*, 132 *Pa. St.* 27; 18 *Atl.* 1087; *Ransom v. N. Y. & Erie R. Co.*, 15 *N. Y.* 415). To the same effect, *Curtis v. Rochester, etc. R. Co.*, 18 *N. Y.* 534; *Gilbertson v. Forty-second*

permanent reduction of his power to earn money,⁴ provided, of course, that such damage is a proximate result of the injury. As already stated, allowance should be made for all such damages, future as well as past, if reasonably certain to occur.⁵

St. R. Co., 14 N. Y. App. Div. 294; 43 N. Y. Supp. 782; Peoria Bridge Asso. v. Loomis, 20 Ill. 235; Oliver v. North Pacific Tr. Co., 3 Ore. 84; Linsley v. Bushnell, 15 Conn. 225; West v. Forrest, 22 Mo. 344. For further details, see § 761, *post*. Mental suffering is also allowed for, when coupled with any bodily injury, however slight (Kennon v. Gilmer, 131 U. S. 22; 9 S. Ct. 696; Dist. Columbia v. Woodbury, 136 U. S. 450; 10 S. Ct. 990; Masters v. Warren, 27 Conn. 293; Memphis, etc. R. Co. v. Whitfield, 44 Miss. 466; Dirmeyer v. O'Hern [La.], 3 So. 132; Sidekum v. Wabash, etc. Ry. Co., 93 Mo. 400; 4 S. W. 701). For the limitations upon its recovery, see § 761, *post*.

⁴ Dist. Columbia v. Woodbury, 136 U. S. 450; 10 S. Ct. 990; Fisher v. Jansen, 128 Ill. 549; 21 N. E. 598; Haden v. Sioux City, etc. R. Co., 92 Iowa, 226; 60 N. W. 537; Holyoke v. Grand Trunk R. Co., 48 N. H. 541. In an action against a carrier, for a personal injury, the jury are to consider what, before the injury, was the health and physical and mental ability of the plaintiff to maintain his family, as compared with his condition afterwards, in consequence of the injury, and how far it is permanent in its results, as well as the physical and mental suffering he has sustained by such injury, and should allow such damages as will fairly compensate the plaintiff for the loss and injury so sustained (Stockton v. Frey, 4 Gill, 406; Toledo, etc. R. Co. v. Baddeley, 54 Ill. 19). *s. p.*, Phillips v. Southwestern R. Co., L. R. 4 Q. B. Div. 406. In a similar action it was

held that the plaintiff might prove that he was engaged in a particular business, for which he has been incapacitated, though the declaration contained no specification of such business, or any statement that he was obliged to relinquish the same (Wade v. Leroy, 20 How. U. S. 24). But, in Massachusetts, such damages must be specially pleaded (Baldwin v. Western R. Co., 4 Gray, 333), and if the value of the business lost is to be allowed, it should certainly be specially pleaded (Collins v. Dodge, 37 Minn. 503; 35 N. W. 368). That "plaintiff's right hand had been permanently injured and ruined and rendered unfit for use and labor," held, to be a sufficient allegation of special damages (Indiana Car Co. v. Parker, 100 Ind. 181). See Marion v. Chicago, etc. R. Co., 64 Iowa, 568; 21 N. W. 86; 66 Iowa, 585; Klein v. Jewett, 26 N. J. Eq. 474; Colby v. Wiscasset, 61 Me. 304; Houston, etc. R. Co. v. Boehm, 57 Tex. 152; Houston, etc. R. Co. v. Willie, 53 Id. 318. But, where no evidence is given as to the circumstances and condition in life of the plaintiff, his earning power, skill and capacity, no damages for future pecuniary loss can be awarded (Staal v. Grand St., etc. R. Co., 107 N. Y. 625; 13 N. E. 624). The fact that plaintiff had, after the injury, received a salary as postmaster, is to be considered on the question of damages (Goodhart v. Pennsylvania R. Co., 177 Pa. St. 1; 35 Atl. 191).

⁵ § 743, *ante*; Sherwood v. Chicago, etc. R. Co., 82 Mich. 374; 46 N. W. 773. Future damages should include diminished capacity for earnings

But where such an action can be revived, after death of the injured person, damages cannot (unless authorized by statute) be recovered in that action for the death⁶ or for any loss accruing after the death.⁷ A person in delicate health may recover for all injuries suffered by him, even though the same consequences would not have resulted, if he had been in ordinary health, and although the defendant had no notice of his poor health.⁸ The moral character of the plaintiff does not affect the measure of his damages.⁹ There is no fixed measure by which the damages can be precisely ascertained; and much must be left to the discretion of the jury;¹⁰ but they must be limited to the consideration of proper damages.¹¹

§ 759. **Expenses of cure.**—In order to warrant any recovery

(*Richmond, etc. R. Co. v. Norment*, 84 Va. 167; 4 S. E. 211; *Sioux City, etc. R. Co. v. Smith*, 22 Neb. 775; 36 N. W. 285; *Howard Oil Co. v. Davis*, 76 Tex. 630; 13 S. W. 665; *Ft. Worth, etc. R. Co. v. Robertson* [Tex.], 16 S. W. 1093 [child]), expenses of future medical and other attendance (*Hopkins v. Atlantic, etc. R. Co.*, 36 N. H. 9; *South Ala. R. Co. v. McLendon*, 63 Ala. 266; *Kendall v. Albia*, 73 Iowa, 241; 34 N. W. 833), future pain and suffering (§ 743, *ante*), and, in an action brought by a husband, parent or master, loss of future service (*Hopkins v. Atlantic, etc. R. Co.*, 36 N. H. 9). In determining the actual damages sustained by one who is permanently injured and rendered incapable of earning compensation, the expectancy of plaintiff's life must be considered; the damage being continuing, and ending only with his life (*Knapp v. Sioux City, etc. R. Co.*, 71 Iowa, 41; 32 N. W. 18).

⁶ *Quinn v. Johnson Forge Co.*, 9 Houst. 338; 32 Atl. 858.

⁷ *Atchison, etc. R. Co. v. Chance*, 57 Kans. 40; 45 Pac. 60.

⁸ *Louisville, etc. R. Co. v. Wood*, 113 Ind. 544; 14 N. E. 572; *Owens*

v. Kansas City, etc. R. Co., 95 Mo. 169; 8 S. W. 250; *Driess v. Friederick*, 73 Tex. 461; 11 S. W. 493 [leg previously broken]; *Sloane v. Southern Cal. R. Co.*, 111 Cal. 669; 44 Pac. 320 [nervous paroxysms]; *Mann Car Co. v. Dupre*, 4 C. C. A. 540; 54 Fed. 646 [miscarriage].

⁹ *Indianapolis, etc. R. Co. v. Bush*, 101 Ind. 582.

¹⁰ *Railroad Co. v. Barron*, 5 Wall. 90, 105; *Richmond, etc. R. Co. v. Allison*, 86 Ga. 145; 12 S. E. 352.

¹¹ Where the court charged "that there was no certain rule by which to estimate the damages for the personal injury to the plaintiff, and that the jury will fix them at such sum as they think right and proper under the evidence," held, that the instruction should have been more precise, and that, as the injury was not willful, the jury should have been limited to compensatory damages (*Heil v. Glandring*, 42 Pa. St. 493; *Collins v. Leafey*, 124 Id. 203; 16 Atl. 765; *Louisville, etc. R. Co. v. Case*, 9 Bush, 728). But compare *Frericks v. Bermes*, 22 Fed. 424; *Indiana Car Co. v. Parker*, 100 Ind. 181.

for the expense of cure, some evidence must be given of the value or actual cost¹ and necessity² of medicines and attendance. But the plaintiff may recover such value, when proved, notwithstanding the fact that the expenses have not yet been paid,³ or were paid by a stranger to the action,⁴ or that the cure was effected by the gratuitous services of a benevolent physician.⁵ For such kindness was obviously intended for the benefit of the injured person, and not for the benefit of the injurer; and the benevolent stranger could not sue the latter for the amount thus expended.⁶ Still less can the claim be resisted by evidence that the plaintiff could have obtained for nothing services for which he paid.⁷ The case is entirely dif-

¹ *Reed v. Chicago, etc. R. Co.*, 57 Iowa, 23; 10 N. W. 285; *Eckerd v. Chicago, etc. R. Co.*, 70 Iowa, 353; 30 N. W. 615. Plaintiff cannot recover where it merely appears that plaintiff was treated in a city hospital, and there is no evidence as to the value of the services and medicines, or that she paid or incurred any liability therefor (*Duke v. Missouri Pac. R. Co.*, 99 Mo. 347; 12 S. W. 636). But plaintiff is entitled to recover for medical services and nursing, though there is no evidence as to the value of the nursing; the presumption being that jurors were reasonably familiar with the value of such services (*Murray v. Missouri Pac. R. Co.*, 101 Mo. 236; 13 S. W. 817). Proof of the amount of physicians' bills which plaintiff has paid on account of the injuries is admissible without proof of the value of the physicians' services (*Morsemann v. Manhattan R. Co.*, 16 Daly, 249; 10 N. Y. Supp. 105). To the contrary, *Galveston, etc. R. Co. v. Thornsberry* [Tex.], 17 S. W. 521. Evidence of expenses incurred by plaintiff in treating himself for the injuries is admissible, and it is a question for the jury whether or not such expenses were reasonable or necessary (*Hart v. Charlotte, etc. R. Co.*, 33 S. C. 427; 12 S. E. 9).

² *Hewitt v. Eisenbart*, 36 Neb. 794; 55 N. W. 252. It is error to allow a surgeon to testify as to the expense of an operation which in his judgment would become necessary at some remote period (*Cuming v. Brooklyn R. Co.*, 109 N. Y. 95; 16 N. E. 65).

³ *Donnelly v. Hufschmidt*, 79 Cal. 74; 21 Pac. 546; *Wilson v. Southern Pac. Co.*, 13 Utah, 352; 44 Pac. 1040; *Lacas v. Detroit R.*, 92 Mich. 412; 52 N. W. 745; *Denver R. Co. v. Lorentzen*, 79 Fed. 291; 24 C. C. A. 592; *Reynolds v. Niagara Falls*, 81 Hun, 353; 30 N. Y. Supp. 954.

⁴ *Klein v. Thompson*, 19 Ohio St. 569.

⁵ *Varnham v. Council Bluffs*, 52 Iowa, 698; 3 N. W. 792. But it has been held that plaintiff cannot recover, as expenses incurred, the value of services of members of his family in nursing him, in the absence of an express agreement on his part to pay therefor (*Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1; 35 Atl. 191).

⁶ See the analogous cases of wages paid, though not earned (§ 760) and insurance (§ 765).

⁷ *Kendall v. Albia*, 73 Iowa, 241; 34 N. W. 833.

ferent, where the action is brought by a married woman or an infant, and the husband or parent has paid the expense of cure; because such husband or parent has a legal claim against the wrong-doer for the amount thus paid. In such cases, therefore, these expenses cannot be recovered without proof that they were paid out of the separate property of the plaintiff, or paid by a stranger for the direct benefit of the plaintiff, so that the defendant shall not be exposed to a double liability.⁸

§ 760. **Loss of time and capacity to earn.** — The value of the plaintiff's time should be estimated with due regard to his actual earnings, and not upon any uniform valuation of time. Therefore evidence is competent for either party as to the nature of the plaintiff's occupation,¹ the extent of his business,² the importance of his personal oversight of it,³ his age and intelligence,⁴ and his average earnings before and since the injury;⁵ but the evidence must not mingle profits derived from

⁸ A wife cannot recover expenses for which her husband is liable (*Bel-yea v. Minneapolis, etc. R. Co.*, 61 Minn. 224; 63 N. W. 627; *Tompkins v. West*, 56 Conn. 478; 16 Atl. 237); unless she paid them out of her *separate estate* (*Moody v. Osgood*, 50 Barb. 628; see *Drinkwater v. Dinsmore*, 80 N. Y. 390). But in Indiana, a married woman may recover medical expenses, though her husband is liable therefor (*Columbus v. Strasser*, 138 Ind. 301; 34 N. E. 5). It has been held that damages cannot be recovered by a minor for medical expenses which were only chargeable to his father (*Newbury v. Getchell Co.* [Iowa], 69 N. W. 743), or which were paid by her brother (*Peppercorn v. Black River Falls*, 89 Wisc. 38; 61 N. W. 79). But this last is a misapplication of the principle. A brother does not stand in the place of a father.

¹ *Dist. Columbia v. Woodbury*, 136 U. S. 450; 10 S. Ct. 990; *Ohio, etc. R. Co. v. Hechet*, 115 Ind. 443; 17 N. E. 297.

² *Phillips v. Southw. R. Co.*, L. R. 4 Q. B. Div. 406.

³ *New Jersey Exp. Co. v. Nichols*, 33 N. J. Law, 434; *Lincoln v. Saratoga, etc. R. Co.*, 23 Wend. 425; *Wade v. Leroy*, 20 How. U. S. 34. An extensive and lucrative business is to be considered (*Walker v. Erie R. Co.*, 63 Barb. 260); and the plaintiff's inability to continue it (*Phillips v. Southwestern R. Co.*, L. R. 4 Q. B. Div. 406). In an action to recover for injuries to plaintiff and his traction engine, evidence that plaintiff had work for the engine to perform for many days ahead when the injury occurred, is admissible (*Woodbury v. Owosso*, 64 Mich. 239; 31 N. W. 130).

⁴ *Huizega v. Cutler, etc. Lumber Co.*, 51 Mich. 272; 16 N. W. 643. Early manhood is of special value (*Walker v. Erie R. Co.*, 63 Barb. 260).

⁵ *Ehrgott v. New York*, 96 N. Y. 264; *Wade v. Leroy*, 20 How. U. S. 343; *Nebraska v. Campbell*, 2 Black, 590; *Phillips v. Southw. R. Co.*, L. R. 4 Q. B. Div. 406; *Wallace v.*

use of capital with earnings from personal labor and skill.⁶ It is generally held that in the absence of any evidence as to plaintiff's past or probable future earnings, only nominal damages can be allowed for such earnings.⁷ But a contrary decision was made in Illinois;⁸ and the rule has no application to a child; since its earnings after attaining majority must needs be a matter of conjecture.⁹ And if the plaintiff uses his time for any valuable purpose, though he does not actually earn money by it, he should be allowed the reasonable value thereof.¹⁰ But if he has been accustomed to spend his time in mere pleasure seeking, he ought not to recover anything for the loss of his time. Therefore evidence to show that the plaintiff was an habitual drunkard is competent in mitigation of damages.¹¹ The plaintiff's profits in a business carried on by him, before the injury, are not a proper measure of his damages for loss of time.¹² The true test is the value of his personal services in

Western N. C. R. Co., 104 N. C. 442; 10 S. E. 552; *Lincoln v. Beckman*, 23 Neb. 677; 37 N. W. 593; *Parshall v. Minneapolis, etc. R. Co.*, 35 Fed. 649 [minister's salary]. Plaintiff may show annual earnings for six years prior to the injury (*Ehrgott v. New York*, 96 N. Y. 264). A lawyer proved annual earnings for five years in *Nash v. Sharpe* (19 Hun, 365). See, also, *Kessel v. Butler*, 53 N. Y. 612; *Joslin v. Grand Rapids Ice Co.*, 53 Mich. 322; 19 N. W. 17; *Bridger v. Asheville, etc. R. Co.*, 27 S. C. 456; 3 S. E. 860. Proof of wages earned before and after the accident is proper (*Miller v. Manhattan R. Co.*, 73 Hun, 512; 26 N. Y. Supp. 162). See *Louisville, etc. R. Co. v. Frawley*, 110 Ind. 18; 9 N. E. 594; *Schultz v. Chicago, etc. R. Co.*, 48 Wisc. 375; 4 N. W. 399; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; 1 N. E. 364; *Secord v. St. Paul, etc. R. Co.*, 18 Fed. 221. The unearned wages which an injured person receives from his employer are not to go in mitigation of damages (*McLaughlin v. Corry*, 77 Pa. St. 109).

⁶ *Masterton v. Mt. Vernon*, 58 N. Y. 391; as explained in *Ehrgott v. New York*, *supra*.

⁷ *Britton v. Street R. Co.*, 90 Mich. 159; 51 N. W. 276; *Leeds v. Met. Gas Co.*, 90 N. Y. 26; *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378; 11 So. 733; *Wood v. Watertown*, 58 Hun, 298; 11 N. Y. Supp. 864; *Nien-dorff v. Manhattan R. Co.*, 4 N. Y. App. Div. 46; 38 N. Y. Supp. 690; *O'Brien v. Loomis*, 43 Mo. App. 29.

⁸ *Fisher v. Jansen*, 128 Ill. 549; 21 N. E. 598 [right arm made useless].

⁹ *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9; 18 S. W. 890.

¹⁰ See *Dist. Columbia v. Woodbury*, 136 U. S. 450; 10 S. Ct. 990.

¹¹ *Cleveland, etc. R. Co. v. Sutherland*, 19 Ohio St. 151; *contra*, *Baltimore, etc. R. Co. v. Boteler*, 38 Md. 568.

¹² The profits of a business of which plaintiff was manager cannot be shown as a measure of his earning powers before the injury (*Goodhart v. Pennsylvania R. Co.* 177 Pa. St. 1; 35 Atl. 191). *s. p.*, *Masterton v. Mt. Vernon*, 58 N. Y. 391. Much less is

conducting the business,¹³ with no allowance for profits which might have been made, either upon the services of others¹⁴ or upon the purchase and sale of goods.¹⁵ Lost profits or the necessity of hiring substitutes are special damages, and must be specially pleaded.¹⁶ Where there is evidence that plaintiff was permanently injured, mortuary tables are admissible to show his expectancy of life, although not essential.¹⁷ The proper measure of damages for loss of earning capacity is the sum required to purchase for such person an annuity, equal to the difference between his probable yearly earnings during his entire life, in his actual condition, and what they would have been had he not suffered the injury.¹⁸ But in estimating such loss, the jury must be instructed to diminish the allowance for the decline of life, when such earnings would diminish from the natural infirmities of age.¹⁹ And it is clearly improper to allow such sum as will, at legal interest, produce the annual amount of the plaintiff's earnings; as this requires the defendant in effect to pay the plaintiff's annual loss and, in addition, a gross sum sufficient to produce that amount at legal interest.²⁰

evidence admissible of what plaintiff earned in a business which he had sold out together with the good will, prior to the accident (Boston, etc. R. Co. v. O'Reilly, 158 U. S. 334; 15 S. Ct. 830).

¹³ Silsby v. Michigan Car Co., 95 Mich. 204; 54 N. W. 761.

¹⁴ Id.

¹⁵ Johnson v. Manhattan R. Co., 52 Hun, 111; 4 N. Y. Supp. 848; Marks v. Long Island R. Co., 14 Daly, 61. A traveling salesman's percentage of the amount of his sales is not "profits," in the sense of that word as here used, and, in an action for damages sustained from personal injuries, plaintiff may recover such percentage, and show the amount of his ordinary business (Rio Grande Western R. Co. v. Rubenstein, 5 Colo. App. 121; 38 Pac. 76).

¹⁶ Gumb v. Twenty-third Street R. Co., 114 N. Y. 411; 21 N. E. 993; Pueblo v. Griffin, 10 Colo. 366; 15 Pac. 616.

¹⁷ They are admissible (Columbus v. Sims, 94 Ga. 483; 20 S. E. 332; Friend v. Ingersoll, 39 Neb. 717; 58 N. W. 281; Steinbrunner v. Pittsburgh, etc. R. Co., 146 Pa. St. 504; 23 Atl. 239; Whelan v. N. Y., Lake Erie, etc. R. Co., 38 Fed. 15); but they are not essential (Deisen v. Chicago, etc. R. Co., 43 Minn. 454; 45 N. W. 864).

¹⁸ Baltimore, etc. R. Co. v. Hawthorne, 19 C. C. A. 623; 73 Fed. 634. But compare Morrison v. Long Island R. Co., 3 N. Y. App. Div. 295; 38 N. Y. Supp. 393.

¹⁹ Savannah, etc. R. Co. v. McLeod, 94 Ga. 530; 20 S. E. 434; East Tennessee, etc. R. Co. v. McClure, 94 Ga. 658; 20 S. E. 93.

²⁰ Gregory v. N. Y., Lake Erie, etc. R. Co., 55 Hun, 303; 8 N. Y. Supp. 525. It is error to use this as an illustration, though stated not to be a controlling rule (Kinney v. Folkerts, 78 Mich. 687; 44 N. W. 152).

An unemancipated minor cannot recover for loss of time or of capacity to earn during his minority, as his time belongs to his father;²¹ and a married woman cannot usually recover for loss of her time, because it belongs to her husband;²² but this rule is often modified by local statutes.²³

§ 761. Bodily and mental suffering.—It is not necessary, in order to justify an allowance for pain, that there should be direct evidence of the extent of pain actually endured. A jury can very well judge of that from ordinary human experience.¹ Such evidence, however, is entirely competent.² Bodily disfigurement is to be considered as an important item in estimating damages,³ as to both the physical and mental pain thereby caused,⁴ including any legitimate feelings of humiliation or modification.⁵ Mental suffering, when connected with any bodily injury, is always to be considered in damages.⁶ But

²¹ *Texas, etc. R. Co. v. Morin*, 66 Tex. 225; 18 S. W. 503; *Peppercorn v. Black River Falls*, 89 Wisc. 38; 61 N. W. 79.

²² *Thomas v. Brooklyn*, 58 Iowa, 458; 10 N. W. 849; *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; *Blaechinska v. Howard Mission*, 130 N. Y. 497; 29 N. E. 755. Yet a physical injury impairing her capacity to labor is classified with pain and suffering, and she has such an interest in her "working capacity" that she can recover for its impairment (*Metropolitan R. Co. v. Johnson*, 90 Ga. 500; 16 S. E. 49).

²³ *Brooks v. Schwerin*, 54 N. Y. 343.

¹ Pain is sufficiently proved by proof of mangling and crushing (*Chicago, etc. R. Co. v. Warner*, 108 Ill. 538).

² *Ib.*

³ *Birmingham v. Lewis* [Ala.], 9 So. 243; *Western, etc. R. Co. v. Young*, 81 Ga. 397; 7 S. E. 912; *St. Louis S. W. R. Co. v. Dobbins*, 60 Ark. 481; 30 S. W. 887.

⁴ *Townsend v. Briggs*, 99 Cal. 481;

32 Pac. 307; 34 Id. 116 [amputated arm].

⁵ Where a little boy's legs have been amputated, it is not error to instruct that the jury may award damages "for the mortification and anguish of mind which he has suffered, and will suffer in the future, by reason of the mutilation of his body and the fact that he may become an object of ridicule among his fellows" (*Heddles v. Chicago, etc. R. Co.*, 77 Wisc. 228; 46 N. W. 115; *Schmitz v. St. Louis, etc. R. Co.*, 119 Mo. 256; 24 S. W. 472). It is not strictly accurate to charge that jury may consider the injury to plaintiff's "pride and manhood;" but as he was permanently deformed by his injury the jury might well apply the charge to the deformity; and so the error was held not serious (*Atlanta, etc. R. Co. v. Wood*, 48 Ga. 565). But to the contrary, see *Chicago, etc. R. Co. v. Caulfield*, 63 Fed. 396; 11 C. C. A. 552; *Chicago, etc. R. Co. v. Hines*, 45 Ill. App. 299.

⁶ In an action for personal injuries caused by an accident resulting

damages cannot be recovered for mental suffering alone, in an action on personal injuries, caused by any negligence not gross and reckless.⁷ There must be some "impact" or other direct injury to person or property, to allow mental sufferings to be included in such cases.⁸ The mental suffering which may be allowed for includes such as arises from the plaintiff's reflec-

from defendant's negligence, it is proper to instruct the jury that in estimating the damages they may take into consideration plaintiff's "suffering in body and mind" (*Chicago v. McLean*, 133 Ill. 148; 24 N. E. 527; *Central R. Co. v. Serfass*, 153 Ill. 379; 39 N. E. 119; *Reinke v. Bentley*, 90 Wisc. 457; 63 N. W. 1055; *Alexander v. Humber*, 86 Ky. 565; 6 S. W. 453; *Gallagher v. Bowie*, 66 Tex. 265; 17 S. W. 407; *American Waterworks Co. v. Dougherty*, 37 Neb. 373; 55 N. W. 1051).

⁷*Spade v. Lynn, etc. R. Co.* 168 Mass. 285; 47 N. E. 88; *Ewing v. Pittsburgh, etc. R. Co.* 147 Pa. St. 40; 23 Atl. 340; *Fox v. Borkey*, 126 Pa. St. 164; 17 Atl. 604; *Wyman v. Leavitt*, 71 Me. 227; *Joch v. Dankwardt*, 85 Ill. 331; *Keyes v. Minneapolis, etc. R. Co.*, 36 Minn. 290; 30 N. W. 888; *Chapman v. Western U. Tel. Co.*, 88 Ga. 763; 15 S. E. 901; *Trigg v. St. Louis, etc. R. Co.*, 74 Mo. 147; *Spohn v. Missouri Pac. R. Co.*, 116 Mo. 617; 22 S. W. 690; *Salina v. Trosper*, 27 Kans. 544; *Summerfield v. Western U. Tel. Co.*, 87 Wisc. 1; 57 N. W. 973; *Lynch v. Knight*, 9 H. L. Cas. 577; *Johnson v. Wells*, 6 Nev. 224. This limitation certainly does not apply to actions on willful injuries, nor to cases of gross and reckless negligence, where the wrongdoer was indifferent to the injury which he might cause (*Spade v. Lynn, etc. R. Co.* 168 Mass. 285; 47 N. E. 88; *Purcell v. St. Paul R. Co.*, 48 Minn. 134; 50 N. W. 1034; *Lombard v. Lennox*, 155 Mass. 70; 28 N. E. 1125; *Fillebrown v. Hoar*, 124 Mass. 580). Some language used by

the court in *Spohn v. Missouri Pac. R. Co.* (116 Mo. 617; 22 S. W. 690), may seem inconsistent with this limitation, if separated from other language and from the facts; but the decision clearly does not involve the point.

⁸No damages can be given by reason of peril and fright, not accompanied by some actual injury caused thereby and traceable directly thereto (*Atchison, etc. R. Co. v. McGinnis*, 46 Kans. 109; 26 Pac. 453; *Gulf, etc. R. Co. v. Trott*, 86 Tex. 412; 25 S. W. 419). No recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no direct bodily injury (*Mitchell v. Rochester R. Co.*, 151 N. Y. 107; 45 N. E. 354; *rev'g* 77 Hun, 607 [miscarriage resulting from nervous shock]; *Lehman v. Brooklyn R. Co.*, 47 Hun, 355 [horse ran away; nervous disease]; *Spade v. Lynn, etc. R. Co.*, 168 Mass. 285; 47 N. E. 88; *Haile v. Texas, etc. R. Co.*, 60 Fed. 557; 9 C. C. A. 134 [insanity from suffering]). An action will not lie for negligence causing damage by terror and occasioning nervous or mental shock unaccompanied by "impact," though plaintiff was placed in imminent peril, and sustained a mental shock causing personal injuries (*Victorian R. Com. v. Coultres*, 13 App. Cas. 222). But where there is any "impact," such as the collision of a train with a wagon, recovery may be had for the nervous shock resulting from fright (*Warren v. Boston, etc. R. Co.*, 163 Mass. 484; 40 N. E. 895). And in *Purcell v. St. Paul R. Co.* (48 Minn.

tions upon what he personally has to endure,⁹ or anxiety for his escape.¹⁰ But his distress, in view of the consequences which his disability may bring upon others, even of his own family, is too remote a consequence of the injury to be compensated for in damages;¹¹ as is also his anxiety about others (not his own children) who may be in danger from the same cause.¹² But in an action against a physician, for an injury to the wife in delivering her of a child, damages may be given, not only for the loss of time necessary to effect a cure, and the expense of employing another physician,¹³ but also for the mental suffering of the wife, produced by the destruction of the child.¹⁴

§ 761a. Ejected passenger. — A passenger, wrongfully ejected by a carrier, while on a journey, may recover, not only for resulting expenses,¹ time lost,² exposure to weather,³ bodily

134; 50 N. W. 1084), it was expressly held that a woman could recover where miscarriage was brought on by fright. That was perhaps a case of gross, though not reckless negligence.

⁹ Warner v. Chamberlain, 7 Houst. 18; 30 Atl. 638 [fear of hydrophobia on bite of dog].

¹⁰ The mental suffering and anxiety caused by the apprehension of danger, or by efforts to escape from the consequences of the injury, may be considered by jury (Seger v. Barkhamsted, 22 Conn. 290; Canning v. Williamstown, 1 Cush. 451; Clark v. Westcott, 2 N. Y. App. Div. 503; 37 N. Y. Supp. 1111; Atchison, etc., R. Co. v. Midgett, 1 Kans. App. 138; 40 Pac. 995). But it is error to charge that compensation "takes in apprehension" where there is no evidence that plaintiff has suffered in the slightest degree from apprehension (Gilbertson v. Forty-second St. R. Co., 14 N. Y. App. Div. 294; 35 N. Y. Supp. 1081).

¹¹ Atchison, etc. R. Co. v. Chance, 57 Kans. 40; 45 Pac. 60; Texas Mex. R. Co. v. Douglas, 69 Tex. 694; 7 S. W. 77.

¹² Keyes v. Minneapolis, etc. R. [LAW OF NEG. VOL. II — 83]

Co., 36 Minn. 290; 30 N. W. 888; Pullman Car Co. v. Trimble, 8 Tex. Civ. App. 335; 28 S. W. 96. But in an action for the wrongful destruction of a furnace on premises occupied by plaintiff, evidence that plaintiff's infant child was ill at the time, and had to be removed is admissible as a basis for damages for mental suffering and anxiety on plaintiff's part, though the child suffered no injury by the change (Vogel v. McAuliffe, 18 R. I. 791; 31 Atl. 1).

¹³ Leighton v. Sargent, 31 N. H. 119.

¹⁴ Smith v. Overby, 30 Ga. 241.

¹ Pennsylvania Co. v. Connell, 127 Ill. 419; 20 N. E. 89; Paddock v. Atchison, etc. R. Co., 37 Fed. 841.

² Cases *supra*; also Carpenter v. Pennsylvania R. Co., 13 N. Y. App. Div. 328; 43 N. Y. Supp. 203. There held that passenger falsely imprisoned during one night and then discharged, might recover for loss of earnings during that period, but not the loss of employment for nine months in consequence of his failure to keep an appointment on the morning after his arrest.

³ Serwe v. Northern Pac. R. Co.,

pain and suffering,⁴ the effects of a necessary walk,⁵ and the other usual items of damage, but also for any anxiety or distress or other mental sufferings naturally ensuing from the situation,⁶ and furthermore for the annoyance, vexation, humiliation and indignity put upon him, whether in the act itself or in the offensive manner in which it is done.⁷ The good faith of the agent in ejecting a passenger cannot lessen the compensatory damages recoverable;⁸ although it would of course be material upon a claim of exemplary damages. Even without proof of damages in detail, the mere act of forcible, wrong-

48 Minn. 78; 50 N. W. 1021. While walking, plaintiff was caught in a storm, and sickness resulted. Held, that the consequences of being caught in the storm were not too remote to enter into the computation of damages (*Malone v. Pittsburgh, etc. R. Co.*, 152 Pa. St. 390; 25 Atl. 638; *Fordyce v. Manuel*, 82 Tex. 527; 18 S. W. 657). The jury may consider the condition of the weather, place and manner of the ejection, and any sickness and suffering caused thereby (*Cross v. Kansas City, etc. R. Co.*, 56 Mo. App. 664; *Western, etc. R. Co. v. Ledbetter* [Ga.], 25 S. E. 663).

⁴ See cases cited in notes 3 and 5.

⁵ Effects of long walk may be recovered for, when it was necessary result of ejection (*Ky. Central R. Co. v. Biddle*, Ky. ; 34 S. W. 904; *Fordyce v. Manuel*, 82 Tex. 527; 18 S. W. 657; *Lake Erie, etc. R. Co. v. Cloes*, 5 Ind. App. 444; 32 N. E. 588; *Spicer v. Lynn, etc. R. Co.*, 149 Mass. 207; 21 N. E. 363).

⁶ *Kentucky Cent. R. Co. v. Biddle*, Ky. ; 34 S. W. 904 [mental anguish]. Plaintiff was a girl of sixteen, unaccustomed to travel, and she, with a young girl companion, was ejected by defendant at a small town, where she was a stranger, and where she remained an hour before she was discovered by friends. Held that, as the circumstances were cal-

culated to arouse in plaintiff's mind feelings of insecurity and danger, an instruction that she could not recover for mental suffering arising from any "supposed or anticipated" danger was properly refused (*Missouri Pac. R. Co. v. Kaiser*, 82 Tex. 144; 18 S. W. 305).

⁷ Where a passenger is wrongfully ejected, the jury, in assessing the damages, may consider in connection therewith the annoyance, vexation, and indignity suffered by him (*Carsten v. Northern Pac. R. Co.*, 44 Minn. 454; 47 N. W. 49; *Pennsylvania Co. v. Connell*, 127 Ill. 419; 20 N. E. 89; *Atlanta R. Co. v. Keeny* [Ga.], 25 S. E. 629; *Fordyce v. Manuel*, 82 Tex. 527; 18 S. W. 657). In an action for wrongful ejection from a street car, the jury may take into consideration plaintiff's professional standing, for the purpose of estimating his feeling of humiliation (*Schmitt v. Milwaukee R. Co.*, 89 Wisc. 195; 61 N. W. 834), but no allowance should be made for injury to plaintiff's business or professional reputation (*Id.*).

⁸ The amount of damages recoverable does not depend on the good faith of the officer, but upon what is actually done (*Pittsburgh, etc. R. Co. v. Russ*, 67 Fed. 662; 14 C. C. A. 612; *Atlanta R. Co. v. Keeny*, *supra*; *Atchison, etc. R. Co. v. Dickerson*, 4 Kans. App. 345; 45 Pac. 975).

ful ejection is sufficient to justify a verdict for substantial damages.⁹

§ 762. Circumstances of parties. — The wealth of the defendant¹ or the poverty of the plaintiff² cannot be taken into account, nor directly or indirectly put in evidence; but the amount of property accumulated by the plaintiff's own exertions may be proved, for the purpose of showing his earning capacity,³ on the same principle upon which evidence of his average earnings is admissible.⁴ Evidence as to the number of the plaintiff's family is not competent for the purpose of enhancing damages;⁵ although it may be for some other special purpose, to which it must be confined.⁶ These rules are not entirely applicable to actions to recover damages for death. The loss of service or support, which lies at the foun-

⁹In an action against a railroad company by a passenger for forcibly ejecting plaintiff from defendant's waiting-room at a certain place, plaintiff need not prove that she had sustained damages (*Rose v. Louisville, etc. R. Co.*, 70 Miss. 725; 12 So. 825).

¹Indirect proof of the defendant's wealth is just as inadmissible as direct proof, and for the same reasons (*Moody v. Osgood*, 50 Barb. 628; *Chicago City R. Co. v. Henry*, 62 Ill. 142. Compare *Buckley v. Knapp*, 48 Mo. 152; *Belknap v. Boston, etc. R. Co.*, 49 N. H. 358). So held, in an action for injury causing death (*Conant v. Griffin*, 48 Ill. 410). Otherwise, where exemplary damages are recoverable (*Pullman Car Co. v. Lawrence* [Miss.], 22 So. 53; *Courvoisier v. Raymond*, 23 Colo. 113; 47 Pac. 284; *Eagle v. Kabrick*, 66 Mo. App. 231).

²*Schwanzer v. Brooklyn R. Co.*, 18 N. Y. App. Div. 205; 45 N. Y. Supp. 889; *Shea v. Potrero, etc. R. Co.*, 44 Cal. 414; *La Salle v. Thorndike*, 7 Ill. App. 282; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 505.

³*Shaber v. St. Paul, etc. R. Co.*, 28 Minn. 103.

⁴See §§ 758, 760, *ante*.

⁵In an action against a carrier to recover compensation for personal injuries to the plaintiff, he cannot give in evidence, for the purpose of increasing the damages, that he has a wife and children (*Stockton v. Frey*, 4 Gill, 406; *Shaw v. Boston & Worcester R. Co.*, 8 Gray, 45; *Chicago, etc. R. Co. v. Moranda*, 93 Ill. 302; *Joliet v. Conway*, 119 Ill. 489; 10 N. E. 223; *Central R. Co. v. Moore*, 61 Ga. 151; *Dreiss v. Friedrich*, 57 Tex. 70; *Mulcairns v. Janesville*, 67 Wisc. 24; 29 N. W. 565), or has a child of tender years (*Kreuziger v. Chicago, etc. R. Co.*, 73 Wisc. 158; 40 N. W. 657). The death of plaintiff's husband by the same cause as injured her, or the fact that she has children dependent upon her for support, is not admissible to increase the damages (*Shaw v. Boston & Worcester R. Co.*, 8 Gray, 45).

⁶Evidence as to the number of the plaintiff's family, if really material as tending to show that he would have pursued a certain avocation if not injured, is competent for that purpose only (*Baltimore, etc. R. Co. v. Shipley*, 31 Md. 368).

dation of such an action, may be increased by the necessities of the survivors. Therefore evidence of their poverty and the number of children dependent upon them is admissible.⁷

§ 763. Damages in favor of parent, master, etc.—The damages recoverable by a parent for a negligent injury to the person of his child, are not strictly confined to those which a master can recover for similar injury to a mere servant.¹ But they are limited to an amount fully compensatory for the consequent loss of service,² deducting expense of bringing up³ for a period not exceeding the minority of a child,⁴ or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like,⁵ and for the future increase of

¹ See §§ 771-774, *post*.

¹ The right of action of a father for an injury to his minor child is based on the parental relation, not that of master and servant (*Cuming v. Brooklyn R. Co.*, 109 N. Y. 95; 16 N. E. 65; *Netherland-Am. Steam. Co. v. Hollander*, 8 C. C. A. 169; 59 Fed. 417). Therefore he may recover not only for the actual loss of service to the time of trial, but also for future loss of service during the child's minority, and also for expenses already necessarily incurred by the parent in the cure and care of the child (*Ib.*).

² *Dollard v. Roberts*, 130 N. Y. 269; 29 N. E. 104; and so in all the cases cited. In an action by a father for injuries to his minor son, not wholly disabling him, the measure of damages is not the value of his services during his minority, but the "lessened value" (*Goodrich v. Burlington, etc. R. Co.*, 97 Iowa, 521; 66 N. W. 770). The pain suffered by the child, in so far as it prevented it from being of service to its parents, may be considered in estimating the damages (*Walker v. Second Av. R. Co.*, 57 N. Y. Superior, 141; 6 N. Y. Supp. 536). The parent need not introduce evidence of her expectancy of life in

order to recover for loss of services (*Gulf, etc. R. Co. v. Compton*, 75 Tex. 667; 13 S. W. 667).

³ The measure of damages in such case is the money value of the child's services until it attains its majority, reduced by the cost of its maintenance and education (*Birmingham v. Dorer*, 3 Brewster, 69). S. P., *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 30 Pac. 603.

⁴ The parent is entitled to damages, not only for loss of service up to the time of trial, but also for prospective loss during the child's minority, and for expenses actually incurred or which would be immediately necessary (*Dollard v. Roberts*, 130 N. Y. 269; 29 N. E. 104). The recovery of a parent must be limited to this (*Traver v. Eighth Av. R. Co.*, 6 Abb. N. S. 46; 4 Abb. Ct. App. 422).

⁵ *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Barnes v. Keene*, 132 N. Y. 13; 29 N. E. 1090. The parent may recover for his own services in working, but not more than for a professional nurse (*Id.*). The whole of this paragraph was quoted and approved in *Morgan v. Southern Pac. R. Co.*, 95 Cal. 510; 30 Pac. 603.

expense in bringing up the child, in consequence of the injury;⁶ but not for future medical expenses, as those are to be recovered by the child himself.⁷ Damages awarded upon any other grounds than these clearly belong to the person corporally injured; whose right to sue, it must be remembered, is entirely unaffected by the action of his parent or master.⁸ If the latter should be allowed to recover for the pain and suffering of the servant, it would follow either that the servant could not recover himself for the same cause, or that the negligent person would be liable to pay twice the amount of damage which he had really done. Either alternative is contrary to justice and common sense. A plausible claim might be advanced for the recovery of damages on account of the injured feelings of a parent. But such damages have been disallowed.⁹

§ 764. Damages of husband and wife. — A husband, suing alone, for injuries to his wife, is entitled to compensation for the loss of her services or reduced earning power¹ for her whole life, if it is reasonably certain that her disability will continue so long,² as well as for the cost of her cure and nursing,³ and

⁶ *Lang v. N. Y., Lake Erie, etc. R. Co.*, 51 Hun, 603; 4 N. Y. Supp. 565; citing *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445.

⁷ *Cuming v. Brooklyn R. Co.*, 109 N. Y. 95; 16 N. E. 65.

⁸ Where a father sues for injuries to his child, the child's personal suffering, loss of a limb, etc., would be the subject of an action by the child himself, and should not enter into the computation of the father's damages (*Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372. See *Whitney v. Hitchcock*, 4 Denio, 461; *Covington R. Co. v. Packer*, 9 Bush. 455).

⁹ *Galveston v. Barbour*, 62 Tex. 172. The reasoning applied to some cases of death (*Morgan v. Southern Pac. R. Co.*, 95 Cal. 510; 30 Pac. 603; *Webb v. Denver, etc. R. Co.*, 7 Utah, 17; 24 Pac. 616), is equally applicable here.

¹ *Citizens' R. Co. v. Twiname*, 121

Ind. 375; 23 N. E. 159 [value of services in business]; *Hawkins v. Front Street R. Co.*, 3 Wash. St. 592; 28 Pac. 1021 [same]; *Henry v. Klopfer*, 147 Pa. St. 178; 23 Atl. 337 [domestic services]; *Metropolitan R. Co. v. Johnson*, 91 Ga. 466; 18 S. E. 816. It is error to receive testimony of the husband as to how much her services were worth to *him*, the true rule being what they were worth generally (*Keller v. Gilman*, 93 Wisc. 9; 66 N. W. 800).

² *Readdy v. Shamokin*, 137 Pa. St. 98; 20 Atl. 396; *Allen v. Manhattan R. Co.*, 60 N. Y. Superior, 230; 17 N. Y. Supp. 187; see *Green v. Hudson River R. Co.*, 2 Abb. Ct. App. 277.

³ *Lindsey v. Danville*, 46 Vt. 144; *Henry v. Klopfer*, 147 Pa. St. 178; 23 Atl. 337; *Union Pac. R. Co. v. Jones*, 21 Colo. 340; 40 Pac. 891. He may recover for the value of his own services, in nursing his wife

in addition, compensation for the loss of her society and companionship, "past, present and prospective."⁴ He cannot recover anything for his wife's personal sufferings.⁵ Where husband and wife join in a common-law action, or the wife sues alone, the rule is just the reverse. Damages are then recoverable to the full extent that the wife has personally suffered, and not for any loss sustained by the husband.⁶ Neither husband⁷ nor wife⁸ can recover for loss of prospective offspring, where the wife has suffered miscarriage.

§ 765. Insurance, etc. not deducted from damages. — An insurance against accident or death cannot reduce the damages recoverable by the injured person or his representatives, even though the amount insured be payable to the same persons as those to whom the damages are to be ultimately paid.¹ The same rule, of course, applies to an insurance of property

(*Hazard Co. v. Volger*, 58 Fed. 152; 7 C. C. A. 130), but only the price for which an equally good nurse can be procured (*Id.*). In *Pullman Car Co. v. Smith* (79 Tex. 468; 14 S. W. 993), husband's loss of salary, while attending to injured wife, was allowed. But that is not correct. See note 5, § 763, *ante*.

⁴ *Union Pac. R. Co. v. Jones*, 21 Colo. 340; 40 Pac. 891; *Hopkins v. Atlantic, etc. R. Co.*, 36 N. H. 9; *Ainley v. Manhattan R. Co.*, 47 Hun, 206; *Jones v. Utica, etc. R. Co.*, 40 Id. 349; and clearly implied in *Cregin v. Brooklyn, etc. R. Co.*, 83 N. Y. 595. Therefore, evidence of disturbed marital relations is admissible, in mitigation of damages (*Sullivan v. Lowell, etc. R. Co.*, 163 Mass. 536; 39 N. E. 185), and evidence of happy relations is equally competent to increase damages (*Beeson v. Green Mt. Min. Co.*, 57 Cal. 20; as explained in *Morgan v. Southern Pac. R. Co.*, 95 Cal. 570; 30 Pac. 603).

⁵ *Union Pac. R. Co. v. Jones*, 21 Colo. 340; 40 Pac. 891. In Texas,

not being a common-law state, the rule seems to be otherwise (*Campbell v. Harris*, 4 Tex. Civ. App. 636; 23 S. W. 35).

⁶ In an action by husband and wife for injuries to the latter, recovery cannot be had for loss of her services, nor for the husband's expenses for nursing and medical attendance (*Kavanaugh v. Janesville*, 24 Wisc. 618). The husband alone can sue for these (*Lindsey v. Danville*, 46 Vt. 144).

⁷ *Butler v. Manhattan R. Co.*, 143 N. Y. 417; 38 N. E. 454.

⁸ In an action by a wife for injuries resulting in a miscarriage, damages will not be allowed for the society, enjoyment, and prospective services of the child (*Tunnicliffe v. Bay R. Co.*, 102 Mich. 624; 61 N. W. 11; *Hawkins v. Front St. R. Co.*, 3 Wash. St. 592; 28 Pac. 1021).

¹ *Althorf v. Wolfe*, 22 N. Y. 355; *Harding v. Townshend*, 43 Vt. 536; *Coulter v. Pine*, 164 Pa. St. 543; 30 Atl. 490. Compare *Grand Trunk v. Jennings*, 13 App. Cas. 800.

injured by negligence.² The party effecting the insurance paid for it; and there is no equity in the claim of the negligent person to the benefit of a contract for which he never gave any consideration. Even if the premium were charged to him, he would still have the unfair advantage of an option to take the benefit of a contract *contingently* beneficial, after the contingency has happened. If any difference ought to be made under such circumstances, it is the insurer who ought to receive the benefit of the injured party's claim for damages; but this, also, is rightly settled to the contrary. The principle is, however, of even broader application. No pension³ or gift, which accrues to the injured person as a result of sympathy for his misfortune, can be taken into account.

§ 766. **Damages in case of death : general rule.**—Following the English decisions, under the English statute¹ which suggested all similar laws in the United States, it is uniformly held that statutes, which give a right of action for death, create an entirely new cause of action, and do not revive one which the decedent had;² and the action necessarily bears much analogy to one brought by a parent or husband for injuries to a child or wife.³ The English statute, although not explicit on this point, has always been construed as excluding all damages other than for pecuniary injury;⁴ and most American statutes giving a right of action for death have expressly adopted this rule. The statutes of Arkansas, Michigan, Nebraska, New Jersey, New York, North Carolina, Ohio, Oregon, Vermont, West Virginia, Wisconsin⁵ and, until recently, Illinois,

² *Collins v. N. Y. Central R. Co.*, 5 Hun, 503; *Briggs v. N. Y. Central R. Co.*, 72 N. Y. 26; *Weber v. Morris*, etc. R. Co., 36 N. J. Law, 213; *Regan v. N. Y. & New England R. Co.*, 60 Conn. 124; 22 Atl. 503; *Mathews v. St. Louis, etc. R. Co.*, 121 Mo. 298; 24 S. W. 591; *Dillon v. Hunt*, 105 Mo. 154; 16 S. W. 516.

³ In estimating damages sustained by the widow and children of a person killed through the wrongful act of another, a provision of the law whereby they might, under certain conditions, receive a government

pension in consequence of his death, cannot be considered in mitigation of such damages (*St. Louis, etc. R. Co. v. Maddry*, 57 Ark. 306; 21 S. W. 472).

¹ "Lord Campbell's Act," 9 and 10 Vict., ch. 93 (see § 126, *ante*).

² This is decided or implied in all the cases cited below.

³ See § 763, *ante*.

⁴ *Blake v. Midland R. Co.*, 18 Q. B. 93.

⁵ Ark. Dig. of Stat. [1884], § 5226; Ill. R. S. [1887], c. 70; Mich. Gen. Stat. [1882], § 8314; Neb. Comp. Stat.

all provide for the assessment of damages "with reference to the *pecuniary* injury" sustained by the widow, next of kin, etc., of the deceased person. The courts have uniformly construed this language as restricting the damages recoverable in such an action to an amount which will fairly compensate the persons, for whose benefit the suit was brought, for their loss in a strictly pecuniary sense by the death of the injured person; or, in other words, that nothing can be allowed for in damages which is not of definite pecuniary value.⁶ In Pennsylvania,⁷ Indiana,⁸ and other states,⁹ under less explicit statutes, resem-

[1887], c. 21, § 2; N. Y. Code Civ. Pro., § 1902, *et seq.*; N. J. Rev. [1887], p. 292, § 2; N. C. Code [1883], § 1498 *et seq.*; Ohio R. S. [1894], §§ 6134, 6135; Oregon Code Civ. Pro., § 367; Vt. R. S. [1880], § 2139; Wisc. R. S. [1878], § 4256. The Illinois law was changed in 1893. See § 767, *post*.

⁶ This was first decided in *Blake v. Midland R. Co.* (18 Q. B. 93), and has been uniformly followed ever since (*Safford v. Drew*, 3 Duer, 627; *Lehman v. Brooklyn*, 29 Barb. 234; *Telfer v. Northern R. Co.*, 30 N. J. Law, 188; *Chicago v. Major*, 18 Ill. 349; *Chicago, etc. R. Co. v. Morris*, 26 Id. 400; *Chicago, etc. R. Co. v. Payne*, 56 Id. 534; *Hurst v. Detroit R. Co.*, 84 Mich. 539; 48 N. W. 44; *Cooper v. Lake Shore, etc. R. Co.*, 66 Mich. 261; 33 N. W. 306; *Topping v. Lawrence*, 86 Wisc. 526; 57 N. W. 365; *Anderson v. Chicago, etc. R. Co.*, 35 Neb. 95; 52 N. W. 840; *Grotenkemper v. Harris*, 25 Ohio St. 510; *Steel v. Kurtz*, 28 Id. 199; *Ladd v. Foster*, 31 Fed. 827 [Oregon]). In actions to recover such damages, in order to arrive at the pecuniary worth of the deceased to his family, it is competent to prove his age, strength, health, skill, industry, habits and character, but not the number of children left by him (*Kesler v. Smith*, 66 N. C. 154; *Burton v. Wilmington, etc. R. Co.*, 82 Id. 504).

⁷ *Purdon's Dig.* [1883], p. 1267, § 3; construed in *Penn. R. Co. v. Henderson*, 51 Pa. St. 315. See *Penn. R. Co. v. Bantom*, 54 Id. 495; *Penn. R. Co. v. Zebe*, 33 Id. 318. As to act of 1868, limiting amount of recovery against *railroad companies* for causing death, see *Kay v. Penn. R. Co.*, 65 Pa. St. 269; *North Penn. R. Co. v. Kirk*, 90 Id. 15; *Penn. R. Co. v. Keller*, 67 Id. 300; *Penn. R. Co. v. Langdon*, 92 Id. 21. The measure of damages for killing a father is what he could have earned during his lifetime for the benefit of his family (*Mansfield Coal, etc. Co. v. McEnery*, 91 Pa. St. 185). Nothing can be recovered as a *solatium* for wounded feelings, or by way of vindictive damages (*Penn. R. Co. v. Vandever*, 36 Pa. St. 298).

⁸ *Indiana R. S.* [1881], § 284. In an action by a mother for death of son, held, error to instruct the jury to take into consideration such "other circumstances as have injuriously affected the plaintiff, in person, in peace of mind, and in happiness" (*Ohio, etc. R. Co. v. Tindall*, 13 Ind. 366). A plaintiff cannot unite in one action a claim for injuries to himself and one for death of his child, resulting from the same accident (*Cincinnati, etc. R. Co. v. Chester*, 57 Ind. 297).

⁹ *Iowa: Rev. Code* [1880], § 2526, as construed in *Dwyer v. Chicago*,

bling that of England, the same rule of damages is maintained. It follows, as a matter of course, that the plaintiff in an action of this kind, under the statutes thus far mentioned, cannot recover exemplary damages.¹⁰ Nominal damages may be recovered in New York and most American states;¹¹ but not in Michigan¹² or Texas,¹³ nor in England.¹⁴

§ 767. **Peculiar statutes.**—In a few states, there are statutes which do not limit damages for death to pecuniary injuries only.¹ In some states there is more than one statute on the subject;² and while, under one statute, general damages may be recovered,³ under another, none but pecuniary damages are allowed.⁴ In California, Utah, and, in substance, Illinois, "such damages may be given as, under all the circumstances of the case, may be just."⁵ This includes not only the pecuniary injury, but also the loss of the comfort, society and protection of the deceased to a husband, wife or mother,⁶

etc. R. Co., 84 Iowa, 479; 51 N. W. 244; *Rafferty v. Buckman*, 46 Iowa, 195. *Minnesota*: Gen. St., c. 77, § 2, as construed in *Hutchins v. St. Paul*, etc. R. Co., 44 Minn. 5; 46 N. W. 79.

¹⁰ *Hewlett v. George*, 68 Miss. 703; 9 So. 885; *Lange v. Schoettler*, 115 Cal. 388; 47 Pac. 139. See *Penn. R. Co. v. Ogier*, 35 Pa. St. 60; *Penn. R. Co. v. Books*, 57 Id. 339; *Conant v. Griffin*, 48 Ill. 410.

¹¹ *Quin v. Moore*, 15 N. Y. 432; and cases cited under § 137, *ante*.

¹² Nominal damages cannot be recovered in the absence of allegation and proof of pecuniary injury (*Hurst v. Detroit R. Co.*, 84 Mich. 539; 48 N. W. 44).

¹³ *McGown v. International*, etc. R. Co., 85 Tex. 289; 20 S. W. 80.

¹⁴ *Duckworth v. Johnson*, 4 Hurlst. & N. 653.

¹ So in *Connecticut* (*Goodsell v. Hartford*, etc. R. Co., 33 Conn. 51; *Murphy v. New Haven R. Co.*, 29 Id. 496; *s. c.*, again, 30 Id. 184; *Soule v.*

New Haven R. Co., 24 Id. 575); in *Tennessee* (Code [1884], §§ 3130, 3134); in *Texas* (R. S. [1879], art. 2903).

² So in *Alabama*, *Kentucky* and *Texas*.

³ R. S., *Texas*, arts. 2901, 2903; *Const. Texas*, art. 16, § 26.

⁴ *Alabama Code*, § 2591; *Texas Code*, § 2899; *Louisville, etc. R. Co. v. Orr*, 91 Ala. 548; 8 So. 360. The damages recoverable under art. 2899 are purely pecuniary and compensatory; and a husband suing thereunder for the death of his wife can recover nothing for grief or loss of society; nor does the doctrine of nominal damages apply (*McGown v. International, etc. R. Co.*, 85 Tex. 289; 20 S. W. 80; *Galveston, etc. R. Co. v. Worthy*, 87 Tex. 459; 29 S. W. 376).

⁵ *Cal. Civil Code*, § 377; *Comp. Laws Utah*, § 3179; *Illinois R. S.*, ch. 70, § 2; as amended in 1893.

⁶ *Munro v. Pacific Dredging, etc., Co.*, 84 Cal. 515; 24 Pac. 303 [*de-*

but not the mental suffering, grief, etc., of any survivors,⁷ nor any other ground of damages.⁸ In Missouri and Colorado, damages are according to "mitigating or aggravating circumstances."⁹ Under such a statute, exemplary damages may be recovered upon proof of aggravating circumstances;¹⁰ but without such proof, only actual pecuniary damages can be recovered.¹¹ In some states, exemplary damages are expressly allowed, where death is caused by willful act or gross negligence.¹² The general statute of Alabama is erroneously construed, as allowing punitive damages, and no others;¹³ so that no evidence of actual damage is admissible;¹⁴ while the statute giving a right of recovery to employees against employers is

ceased child]; *Webb v. Denver, etc. R. Co.*, 7 Utah, 17; 24 Pac. 616; *Morgan v. Southern Pac. R. Co.*, 95 Cal. 510; 30 Pac. 603; overruling *Cleary v. City R. Co.*, 76 Cal. 240; 18 Pac. 269. See *Pepper v. Southern Pac. Co.*, 105 Cal. 389; 38 Pac. 974.

⁷ *Munro v. Pacific Dredging, etc. Co.*, 84 Cal. 515; 24 Pac. 303.

⁸ *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 30 Pac. 603. Exemplary, not allowed (*Lange v. Schoettler*, 115 Cal. 388; 47 Pac. 139).

⁹ Damages shall be according to "mitigating or aggravating circumstances" (Mo. Rev. Stat. § 2121). Under this statute, the mental suffering of survivors is to be considered (*Owen v. Brockschmidt*, 54 Mo. 285). This statute is copied in *Colorado*.

¹⁰ *Gray v. McDonald*, 104 Mo. 303; 16 S. W. 398.

¹¹ *Moffatt v. Tenney*, 17 Colo. 189; 30 Pac. 348.

¹² Ky. Stat. 1894, ch. 1, § 6; Mich. Stat. 1883, No. 191; Texas Const., Art. 16, § 26; R. S., § 2901; *International, etc. R. Co. v. McDonald*, 75 Tex. 41; 12 S. W. 860; *Gulf, etc. R. Co. v. Compton*, 75 Tex. 667; 13 S. W. 667. Const. Art. 16, § 26, providing exemplary damages against any person, corporation or company

willfully or negligently committing a homicide, does not apply to cases in which no recovery can be had for actual damages (*Ritz v. Austin*, 1 Tex. Civ. App. 455; 20 S. W. 1029). Under statutes allowing a jury to give such damages, "pecuniary and exemplary," as may to them seem just, exemplary damages can only be given in cases of moral or legal wrong amounting to willfulness (*Klepsch v. Donald*, 4 Wash. St. 436; 30 Pac. 991) or to very gross neglect (*Larzelere v. Kirchgessner*, 73 Mich. 276; 41 N. W. 488).

¹³ Alabama Code 1886, § 2589, was thus construed in *Savannah, etc. R. Co. v. Shearer*, 58 Ala. 672; followed in *Richmond, etc. R. Co. v. Freeman* (97 Ala. 289; 11 So. 800) as a binding authority; although its correctness was questioned. The decision was clearly erroneous; and it is directly opposed to the cases cited in note 15. The statute really *allowed*, but did not *require*, punitive damages. It is not necessary, under this view of the statute, to find that the injury was the result of willful negligence (*Kansas City, etc. R. Co. v. Sanders*, 98 Ala. 293; 13 So. 57).

¹⁴ *Buckalew v. Tennessee Coal, etc. Co.*, Ala. ; 20 So. 606.

purely compensatory, and allows only pecuniary damages,¹⁵ even for a willful injury.¹⁶

§ 767a. **Actions on surviving rights.**—While the cause of action, given by the statutes thus far mentioned, is one which had no existence before the death of the injured person, there are statutes in some states, which revive, in favor of representatives, the same cause of action which the deceased had at the moment of his death.¹ Under such statutes, representatives can recover damages for the sufferings of the deceased, as well as any other damages which he might have recovered.² But if the statute goes no further, the plaintiffs can recover no damages for the death itself or its consequences:³ because the decedent obviously could not have any cause of action for his own death. Especially is this the case where two or more statutes exist, one of which gives a separate right of action on the death alone, while another gives survival rights.⁴ No recovery can be had on account of the resulting injury to the decedent's relatives.⁵ In Massachusetts, although no strictly private action can be maintained for the death of an injured person,⁶ his representatives may recover damages for all the damage accruing to him before death, including his mental as well as physical sufferings, if they can be proved.⁷ It is the

¹⁵ Under the provisions of Code, § 2591, that in certain cases an employer is liable in damages for the death of an employe, recovery is limited to pecuniary loss (Louisville, etc. R. Co. v. Orr, 91 Ala. 548; 8 So. 360; James v. Richmond, etc. R. Co., 92 Ala. 231; 9 So. 335 [no allowance for pain or anguish].

¹⁶ The fact that the injury was willful cannot be considered to enhance the recovery (Louisville, etc. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870).

¹ § 139, *ante*; Laws N. H. 1891, ch. 191; Del. Code, p. 644. Kentucky and South Dakota have both kinds of statutes.

² Corliss v. Worcester, etc. R. Co., 63 N. H. 404. The administrator may recover for pain and suffering

of the deceased by reason of the injuries, and for actual loss of time occasioned thereby (Quinn v. Johnson Forge Co., 9 Houst. 338; 32 Atl. 858; Bowles v. Lane, 3 Metc. [Ky.] 311).

³ Belding v. Black Hills, etc. R. Co., 3 S. Dak. 369; 53 N. W. 750; Quinn v. Johnson Forge Co., *supra*.

⁴ Belding v. Black Hills, etc. R. Co., *supra*.

⁵ Clark v. Manchester, 63 N. H. 577; Jewett v. Keene, *Id.* 701.

⁶ Kearney v. Boston, etc. R. Co., 9 Cush. 108; Moran v. Hollings, 125 Mass. 93. The state can sue, in certain cases, for the benefit of the survivors.

⁷ Where deceased fell twenty feet and became unconscious on striking and remaining so until death, it was

continuance of life, not of sensibility, after the injury, which determines whether a cause of action survives.⁸

§ 768. **For whose benefit recovery allowed.**—Nearly all these statutes allow for damage to the widow and next of kin of a deceased person. But some of them did not mention husbands among those whose damage is to be considered. Where that is the case, no recovery can be had for the benefit of a husband, as such; and therefore his loss cannot be allowed for in the damages recovered for his wife's death, since he is not, in a legal sense, of kin to her.¹ In the statutes of New York, Maryland, Mississippi, South Carolina, Virginia, Ohio, and Wisconsin there is now an express mention of the husband. In most of the other states the damages recovered are declared to be for the exclusive benefit of "widow and next of kin;" but in Alabama, Utah, West Virginia, and Wyoming, the award is only directed to be distributed as personal property of an intestate, without express mention of any one. In nearly all of the states such award of damages is declared not to be subject to the debts of the deceased. In Virginia, Texas, and perhaps other states, the jury may direct in what proportions the damages recovered shall be distributed among the family.

§ 769. **What is pecuniary damage.**—The pecuniary dam-

held there could be no recovery for his mental or other suffering, endured during the fall, because there could be no proof. It was assumed that, if there could have been, there might have been a recovery (*Kennedy v. Standard Sugar Refinery*, 125 Mass. 90). This is admirable hair-splitting. No one would believe any man, who should testify that in such a fall he suffered absolutely no pain.

⁸ *Hollenbeck v. Berkshire R. Co.*, 9 Cush. 478. Where an injury caused immediate insensibility and death in fifteen minutes, an action survived to the administrator (*Bancroft v. Boston, etc. R. Co.*, 11 Allen, 34).

¹ *Dickins v. N. Y. Central R. Co.*, 23 N. Y. 158; *Green v. Hudson River*

R. Co., 32 Barb. 25. In the former case, *Denio, J.*, said: "It is the pecuniary injury resulting to the wife and next of kin which is to be estimated; but the injury to the husband, when it is the wife whose death has been caused by the defendant's act, is not spoken of as a ground of damages. And the husband is not embraced within the description of next of kin of his wife. Husband and wife, as such, are not of kin to each other in a legal sense." The benefit of the New York statute has since been extended to surviving husbands (*Laws of 1870, c. 78; re-enacted in Code Civ. Pro., § 1902*). See *Cregin v. Brooklyn, etc. R. Co.*, 83 N. Y. 595; *Murphy v. N. Y. Central R. Co.*, 88 Id. 445.

age, which alone can be recovered in most of the states for the death of any person, must be something of definite, and almost of commercial value. It is not necessary, however, to show that the deceased was under any legal obligation to the next of kin. If they had a reasonable expectation of pecuniary advantage from the continuance of his life, they may recover for it.¹ Thus, if he was in the habit of making them presents at regular intervals, this would constitute a valid basis for damages.² Much more are damages recoverable where the deceased was legally bound to render service to the next of kin, etc., as in the case of a minor child, whose services belong to his parents.³ And a recovery may be had for prospective damages,⁴ to the extent of the probable continuance of life;⁵

¹ *Dalton v. Southeastern R. Co.*, 4 C. B. N. S. 296; *Franklin v. Southeastern R. Co.*, 3 Hurlst. & N. 211; *Pym v. Great Northern R. Co.*, 4 Best & S. 396; *aff'd*, 2 Id. 749; *Penn. R. Co. v. Bantom*, 54 Pa. St. 495; see *Dickens v. N. Y. Central R. Co.*, 1 Abb. C. A. 504. The fact that the children of the deceased are of full age, living away from home and supporting themselves, does not of itself establish that they have sustained no pecuniary damage (*Lockwood v. N. Y., Lake Erie, etc. R. Co.*, 98 N. Y. 523; *Salem v. Harvey*, 29 Ill. App. 48; *aff'd*, 129 Ill. 344; 21 N. E. 1016; *Petrie v. Columbia, etc. R. Co.*, 29 S. C. 303; 7 S. E. 515).

² In an action by a father to recover damages for the death of his son, it appeared that the son, who earned good wages, had been in the habit for several years of contributing to the support of his parents, who were in humble circumstances, by making them frequent small presents of groceries, and by becoming responsible for their supply of meat. Held, that damages might be given to plaintiff in respect of his being disappointed in a reasonable expectation of pecuniary advantage by the continuance of his son's life (*Dalton*

v. Southeastern R. Co., 4 C. B. N. S. 296). See also *Harlinger v. N. Y. Central R. Co.*, 93 N. Y. 661.

³ The absence of proof of special pecuniary damage resulting from the death of the child will not justify a nonsuit or a direction to find only nominal damages (*Ihl v. Forty-second Street, etc. R. Co.*, 47 N. Y. 317). Where the child was of tender years, it cannot be said, as matter of law, that the expense of maintaining it would have exceeded the value of its services (*Id.*; *O'Mara v. Hudson River Co.*, 38 Id. 445).

⁴ *Houghkirk v. Delaware, etc. Canal Co.*, 92 N. Y. 219; *Searle v. Kanawha, etc. R. Co.*, 33 W. Va. 370; 9 S. E. 248.) In case of death of a young man of twenty-one, his brother in Germany recovered \$5,000; and the award, though deemed large and almost exemplary, was allowed to stand (*Bierbauer v. N. Y. Central R. Co.*, 15 Hun, 559; *aff'd*, 77 N. Y. 588). The verdict in this case seems to have been sustained on the ground of "prospective advantages." See *Tilley v. Hudson River R. Co.*, 24 N. Y. 471.

⁵ *Baltimore, etc. R. Co. v. State*, 33 Md. 542; *Sauter v. N. Y. Central R. Co.*, 66 N. Y. 50.

for the purpose of determining which, any standard life tables may be referred to.⁶ Evidence of the decedent's earnings,⁷ or as to his capacity to earn an income,⁸ or as to his habits⁹ or health,¹⁰ is therefore admissible on either side. But the court must distinctly call the attention of the jury, when assessing prospective damages, to the probability that the decedent's earning capacity would have declined in his declining years.¹¹ The jury may estimate the amount which the decedent would probably have accumulated and have left to his family, had his life not been shortened, and may allow this as damages.¹² Nothing can be allowed, under "pecuniary injury" statutes, for sufferings of the decedent;¹³ nor for grief or

⁶ See § 775, *post*.

⁷ *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; *Richmond, etc. R. Co. v. Hammond*, 93 Ala. 181; 9 So. 577. It is competent to show the income of the deceased before his death, as well as his ability and capacity for labor and his skill in his calling (*Louisville, etc. R. Co. v. Clarke*, 152 U. S. 230; 14 S. Ct. 579). The jury may properly take into consideration the dependent condition of the decedent's family, together with his age, health, strength, and capacity to earn money, in assessing the amount of damages in an action for his wrongful killing, under a statute (23 Stat. 307), providing that the damages are to be assessed with "reference to the injury" done "to the widow and next of kin" (*Baltimore, etc. R. Co. v. Mackey*, 157 U. S. 72; 15 S. Ct. 491; distinguishing *Pennsylvania Co. v. Roy*, 102 U. S. 451).

⁸ Pecuniary loss may be shown by proof of decedent's ability to conduct business and make money (*Tilley v. Hudson River R. Co.*, 29 N. Y. 252). Evidence that decedent had engaged at different times in various pursuits, and of what he made or was capable of making in each, is competent (*Christian v. Columbus, etc. R. Co.*, 90 Ga. 124; 15 S. E. 701).

⁹ Evidence that the deceased was a drunken, worthless man is admissible (*Nashville, etc. R. Co. v. Prince*, 2 Heisk. 580). So, for the plaintiff, is evidence of his habits of industry and sobriety, his state of health and net income (*Richmond, etc. R. Co. v. Hammond*, 93 Ala. 181; 9 So. 577).

¹⁰ *Houghkirk v. Delaware, etc. Canal Co.*, 92 N. Y. 219. Plaintiff may prove the longevity of decedent's father and mother (*Chattanooga, etc. R. Co. v. Clowdis*, 90 Ga. 258; 17 S. E. 88). Evidence that deceased had a disease likely to shorten life is admissible, since the continuance of life constitutes an element of damage (*Columbus, etc. R. Co. v. Bridges*, 86 Ala. 448; 5 So. 864; *Hutton v. Windsor*, 34 Upp. Can. Q. B. 487).

¹¹ *Central R. Co. v. Thompson*, 76 Ga. 770; *Western, etc. R. Co. v. Moore*, 94 Ga. 457; 20 S. E. 640. s. p., *Harrison v. Sutter St. R. Co.*, 116 Cal. 156; 57 Pac. 1019.

¹² *Lake Erie, etc. R. Co. v. Mugg*, 132 Ind. 168; 31 N. E. 564.

¹³ Pain and suffering of deceased cannot be considered by the jury (*Dwyer v. Chicago, etc. R. Co.*, 84 Iowa, 479; 51 N. W. 244; *Lehman v. Brooklyn*, 29 Barb. 234).

distress of his relatives,¹⁴ nor for loss of society,¹⁵ except as between husband and wife.¹⁶ And if the next of kin were not dependent in any degree upon the deceased for support, had no reasonable expectation of pecuniary benefit from him, and no other interest in his life, within the preceding definitions, only nominal damages can be recovered,¹⁷ and, in England, not even these.¹⁸

§ 770.* **Expenses incurred by death.** — Expenses which the next of kin, etc., become legally liable to meet, by the fact of the death of their injured relative, such as funeral expenses, are recoverable;¹ but not so with expenses which are not legally imposed upon them, however natural, usual, and proper. Thus, the cost of mourning dress for the family is not allowable.² And, in an action founded solely upon the *death*, and not on any surviving right of the decedent, expenses incurred for the benefit of the deceased during his lifetime cannot be recovered, even though made necessary by the injury from which he died, unless they would have constituted a debt from him if he had lived,³ if even then.⁴ It is otherwise in actions under a "survival statute." The defendant cannot be allowed to prove, for any purpose, that he paid for the support or care or funeral expenses of the decedent.⁵

¹⁴ *Mynning v. Detroit, etc. R. Co.*, 59 Mich. 257; 26 N. W. 514. See, also, *Au v. N. Y., Lake Erie, etc. R. Co.*, 29 Fed. 72; *Ohio, etc. R. Co. v. Tindall*, 13 Ind. 366.

¹⁵ *Taylor, etc. R. Co. v. Warner*, 84 Tex. 122; 19 S. W. 449 [death of child].

¹⁶ As to this, see § 774, *post*.

¹⁷ *Chicago, etc. R. Co. v. Swett*, 45 Ill. 197. See *Quin v. Moore*, 15 N. Y. 432.

¹⁸ *Duckworth v. Johnson*, 4 Hurlst. & N. 653.

* This was § 771 in the last edition.

¹ The necessary funeral expenses of deceased are proper items of damage, where those interested are legally bound to pay such expenses (*Murphy v. N. Y. Central, etc. R.*

Co., 83 N. Y. 445; *Owen v. Brockschmidt*, 54 Mo. 285; *Cleveland, etc. R. Co. v. Rowan*, 66 Pa. St. 393; *Petrie v. Columbia, etc. R. Co.*, 29 S. C. 303; 7 S. E. 515; *Cons. Tr. Co. v. Hone* [N. J.], 35 Atl. 899; *Gulf, etc. R. Co. v. Southwick* [Tex. Civ. App.], 30 S. W. 592; though it is held otherwise in England (*Dalton v. Southeastern R. Co.*, 4 C. B. N. S. 296). Also in Oregon (*Holland v. Brown*, 35 Fed. 43).

² *Dalton v. Southeastern R. Co.*, 4 C. B. N. S. 296.

³ *Boulter v. Webster*, 13 Weekly Rep. 289.

⁴ *Holland v. Brown*, 35 Fed. 43.

⁵ *Murray v. Usher*, 117 N. Y. 542; 23 N. E. 564.

§ 771.* **Loss of parent.**—Where the decedent left children, their loss of the parent's support,¹ and also of his or her care in their education,² may be taken into consideration, and this although one of the parents survives.³ And the loss of a mother's care has been held a proper ground for damages in favor of a young child, as having not merely a moral value (which cannot be regarded in this action), but also an appreciable pecuniary worth.⁴ In Pennsylvania and Georgia it is held that, where a parent is killed, the damages must not exceed the amount which he would probably have expended upon the support and education of his children.⁵ Damages for loss of support and education are not *necessarily* confined to the minority of a child;⁶ for they often extend far beyond that period; but they are presumably so limited.⁷ Affirmative proof of the parent's probable aid in education must be given, sufficient to show that it had a real value, in order to justify recovery upon that ground.⁸ Testimony as to the number and ages of decedent's children and as to his kind treatment of his family is admissible.⁹

*This was § 770 in the last edition.

¹ McPherson v. St. Louis, etc. R. Co., 97 Mo. 253; 10 S. W. 846.

² In estimating the pecuniary injury the jury may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father (Searle v. Kanawha, etc. R. Co., 32 W. Va. 370; 9 S. E. 248; Baltimore, etc. R. Co. v. Stanley, 54 Ill. App. 215); especially if he was a man of industrious habits and of good character, was a dutiful father, and tried to educate his children properly (St. Louis, etc. R. Co. v. Maddry, 57 Ark. 306; 21 S. W. 472; St. Louis, etc. R. Co. v. Sweet, 60 Ark. 530; 31 S. W. 571); and so also as to the mother (Tilley v. Hudson River R. Co., 29 N. Y. 252; McIntyre v. N. Y. Central R. Co., 37 Id. 287).

³ This was the fact in all the foregoing cases.

⁴ Tilley v. Hudson River R. Co., 29 N. Y. 252; and see s. c., 24 Id. 471.

⁵ Penn. R. Co. v. Butler, 57 Pa. St. 335; David v. Southwestern R. Co., 41 Ga. 223.

⁶ Redfield v. Oakland R. Co., 110 Cal. 227; 42 Pac. 822; Tuteur v. Chicago, etc. R. Co., 77 Wisc. 505; 46 N. W. 897.

⁷ Baltimore, etc. Turnpike v. State, 71 Md. 573; 18 Atl. 884. In Texas, adult children, not supported by their father, have no right of action for his death, since they are not pecuniarily damaged thereby (St. Louis, etc. R. Co. v. Johnston, 78 Tex. 536; 15 S. W. 104).

⁸ Illinois Central R. Co. v. Weldon, 52 Ill. 290.

⁹ Chilton v. Union Pac. R. Co., 8 Utah, 47; 29 Pac. 963; s. p., in part, Tetherow v. R. Co., 98 Mo. 74; 11 S. W. 310; Atchison, etc. R. Co. v. Wilson, 4 U. S. App. 25; 1 C. C. A. 25; 48 Fed. 57.

§ 772. [New]. **Loss of child.**—The “pecuniary injury” resulting to a parent, from the death of a child is usually the excess of a child’s probable earnings, during its minority, over the cost of its support and education.¹ But damages are not necessarily confined to this period.² The jury may allow compensation for the loss of such contribution to the support of parents, after the child attains majority, as the evidence shows reasonable ground for believing that the child would have made.³ Affirmative evidence must be given of such contri-

¹ *Hopkinson v. Knapp, etc. Co.*, 92 Iowa, 212; 60 N. W. 653; *Pierce v. Conners*, 20 Colo. 178; 37 Pac. 721. In an action for the wrongful death of a child, the question of whether there would be a financial profit in bringing up the child in a city, and without a home, is for the jury (*Citizens’ R. Co. v. Lowe*, 12 Ind. App. 47; 39 N. E. 165). Where a minor is killed, leaving, him surviving, a mother, but no father, it is not necessary for her, in order to recover substantial damages for his death, to prove pecuniary loss, since she is entitled to his earnings, and therefore pecuniary loss will be presumed (*Bradley v. Sattler*, 156 Ill. 603; 41 N. E. 171). Where a minor child is killed, the father may, in an action for the loss of the child’s labor and services, recover for services to be computed for the whole remnant of the child’s minority, though the mother under the statute has a right to sue for the death of the child (*Augusta Factory v. Davis*, 87 Ga. 648; 13 S. E. 577). In an action for the death of plaintiff’s daughter, six year’s old, a charge that the value of the child’s services during the period of her minority should be ascertained by the jury as best they could from their own judgment, common sense and sound discretion, and the evidence is proper (*Brunswick v. White*, 70 Tex. 504; 8 S. W. 85).

110 N. Y. 504; 18 N. E. 108; *Gulf, etc. R. Co. v. Compton*, 75 Tex. 667; 13 S. W. 667; *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91; 21 N. E. 575. Otherwise, in Maryland (*Agricultural, etc. Assn. v. State*, 71 Md. 86; 18 Atl. 37), and perhaps in Missouri (*Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286; 6 S. W. 464).

² *Birkett v. Knickerbocker Ice Co.*, *supra*; *Pressman v. Mooney*, 5 N. Y. App. Div. 121; 39 N. Y. Supp. 44. Proof that an adult child was accustomed to contribute from her earnings to the support of her parents, and that they looked to her for such assistance, will justify recovery to an amount which, under the evidence, they might reasonably be expected to have received (*Armour v. Czychki*, 59 Ill. App. 17; *Richmond v. Chicago, etc. R. Co.*, 87 Mich. 374; 49 N. W. 621). Where the proof showed an intent on the part of decedent, a minor son, to aid his parent after majority, plaintiff’s right to recover was not limited to the value of decedent’s services during minority (*St. Louis, etc. R. Co. v. Davis*, 55 Ark. 462; 18 S. W. 628). The question whether decedent would have continued to contribute to the support of his parent after attaining his majority is for the jury (*St. Louis, etc. R. Co. v. Davis*, 55 Ark. 462; 18 S. W. 628; *McLean Co. Coal Co. v. McVey*, 38 Ill. App. 158; *Colorado Coal, etc. Co. v. Lamb*, 6 Colo. App.

³ *Birkett v. Knickerbocker Ice Co.*,

bution in the past or of good reason to expect it in the future, to justify a verdict on this ground, where the child was of full age at the time of death.⁴ Evidence of the parent's poverty and ill health is competent for this purpose.⁵ Loss of the child's society is not a "pecuniary injury."⁶

§ 773. Loss of husband or wife.—Under "pecuniary injury" statutes, only such damage to a surviving husband or wife can be allowed for, as is susceptible of estimate in money,¹

255; 40 Pac. 251). In estimating the damages sustained by a dependent mother, the probable duration of the joint lives of the mother and decedent, and the reasonable expectation of receiving support during that time, should be considered (*Duval v. Hunt*, 34 Fla. 85; 15 So. 876). Where the father and mother of deceased are his only next of kin, it is error to instruct the jury that they should "assess a sum of money equal to the amount plaintiff's decedent would most probably have earned . . . during the period of his life in which he would probably have earned money," for it is improbable that the parents would have survived deceased, and that deceased would not have married (*Louisville, etc. R. Co. v. Wright*, 134 Ind. 509; 34 N. E. 314). But a refusal to instruct "that the father had no claim on the earnings of the son beyond the age of twenty-one years, except in case the father becomes poor, unable to support himself, and the son is shown to have means" in error (*Keenan v. Brooklyn R. Co.*, 145 N. Y. 348; 40 N. E. 15).

⁴ *Cherokee, etc. Coal. Min. Co. v. Limb*, 47 Kans. 469; 28 Pac. 181; *Fordyce v. McCants*, 51 Ark. 509; 11 S. W. 694. *Contra*, *Mollie Gibson Co. v. Sharp*, 5 Colo. App. 321; 38 Pac. 850.

⁵ Evidence that the next of kin, a mother, had no means of support,

and had a malady which disqualified her for work, is proper (*Harlinger v. N. Y. Central R. Co.*, 92 N. Y. 661; *Erwin v. Neversink Steamboat Co.*, 22 Hun, 573; *aff'd*, 88 N. Y. 184; *Bowles v. Rome, etc. R. Co.*, 46 Hun, 324; *Cooper v. Lake Shore, etc. R. Co.*, 66 Mich. 261; 33 N. W. 306; *Sills v. Ft. Worth, etc. R. Co.* [Tex. Civ. App.], 28 S. W. 908). The rule in Illinois seems to be different. Evidence that the boy's father was a man of wealth has been held inadmissible in defense (*Illinois Cent. R. Co. v. Slater*, 129 Ill. 91; 21 N. E. 575), and as to poverty of parent (*Chicago v. McCulloch*, 10 Ill. App. 459). Compare *Overholt v. Viehts*, 93 Mo. 422; 6 S. W. 74.

⁶ Compensation to a father for his child's death, being measured by the pecuniary loss sustained, loss of the child's society and of comfort in bringing it up, are not elements of his recovery (*Mobile, etc. R. Co. v. Watly*, 69 Miss. 145; 13 So. 825).

¹ *Louisville, etc. R. Co. v. Berry*, 96 Ky. 604; 29 S. W. 449; *Gulf, etc. R. Co. v. Southwick* [Tex. Civ. App.], 30 S. W. 592. Under the Colorado statute, the measure of damages of the wife is the estimated accumulations of the deceased during the probable remainder of his life, with reference to his age, occupation, habits, bodily health and ability (*Hayes v. Williams*, 17 Colo.

as in other cases; and the injury to feelings cannot be included.² But opinions differ as to whether the loss of a wife's society is a pecuniary injury. In New York, it is allowed as such.³ In England, Missouri and Texas, it is not.⁴ Under statutes not expressly confined to pecuniary injuries, either husband or wife may recover for loss of society,⁵ though not for mental suffering.⁶ In all such actions, where the widow is a beneficiary, alone or with others, evidence of her dependence upon her husband for support is competent.⁷ Under a statute giving a right of action to a widow alone, the injury to the children must not be considered in damages;⁸ although she may prove the number and ages of her children, merely to show the burden cast upon her by her husband's death.⁹ Where a deceased husband never saved anything, the jury cannot be allowed to speculate upon what his wife's dower might have been.¹⁰ Damages cannot be reduced by

465; 30 Pac. 352.) The measure of damages of the husband is the excess in pecuniary value of the wife's services over the cost of suitably maintaining her (*Gulf, etc. R. Co. v. Southwick*, [Tex. Civ. App.], 30 S. W. 592). It has been said that the recovery by a husband for the death of his wife must be based on the value of her services, and it is incumbent upon the plaintiff to prove such services and their value (*Nelson v. Lake Shore, etc. R. Co.*, 104 Mich. 582; 62 N. W. 993). But the latter point is not correct. Such value may be presumed (*Delaware, etc. R. Co., v. Jones*, 128 Pa. St. 308; 18 Atl. 330).

² *Chicago R. Co. v. Gillam*, 27 Ill. App. 386.

³ Where a wife dies from an injury, the husband is entitled to recover for expenses incurred, and for loss of her services and of her society; but, if he dies pending the action, it will not survive for loss of society, but will for the other items (*Cregin v. Brooklyn, etc. R. Co.*, 83 N. Y. 595; s. c., 75 Id. 192).

⁴ *Blake v. Midland R. Co.*, 18 Q. B.

93; *Schaub v. Hannibal, etc. R. Co.*, 106 Mo. 74; 16 S. W. 924; followed, *Atchison, etc. R. Co. v. Wilson*, 4 U. S. App. 25; 1 C. C. A. 25; 48 Fed. 57. In an action for damages for the death of her husband, a wife cannot recover for being deprived of his solace, comfort, and affection (*Gulf, etc. R. Co. v. Finley*, 11 Tex. Civ. App. 64; 32 S. W. 51).

⁵ *Wells v. Denver, etc. R. Co.*, 7 Utah, 482; 27 Pac. 688.

⁶ *Id.*

⁷ In an action by a widow, as administratrix of her husband, it is proper to allow her to testify that the deceased was at the time of his death her sole support (*Pennsylvania Co. v. Keane*, 143 Ill. 172; 32 N. E. 260; *Chicago, etc. R. Co. v. May*, 108 Ill. 288).

⁸ *Abbot v. McCadden*, 81 Wisc. 563; 51 N. W. 1079.

⁹ *Id.*; *Tetherow v. St. Joseph, etc. R. Co.*, 98 Mo. 74; 11 S. W. 310. To the contrary, *Klepsch v. Donald*, 4 Wash. St. 436; 30 Pac. 991.

¹⁰ *St. Louis, etc. R. Co., v. Needham*, 3 C. C. A. 129; 10 U. S. App. 339; 52 Fed. 371.

the fact that the survivor has married again; and therefore evidence thereof is inadmissible.¹¹ No damages can be allowed in favor of a widow who, at and before her husband's death was living apart from him, in open adultery;¹² and, in our opinion, the same rule would apply against a surviving husband, under similar circumstances. But the mere fact of adultery would not suffice to defeat the entire claim, for it might be condoned. The open adultery of a deceased husband or wife is competent evidence in mitigation of damages.¹³ The Georgia code entitles a widow to recover the gross value of her husband's life, without regard to whether she previously received anything from him, or to what his personal expenses were, or what his character was.¹⁴ Obviously, no damages can be allowed in favor of one who had obtained an absolute divorce from the decedent, whether formerly husband or wife.¹⁵

§ 774. Collateral relatives.—In order to sustain a recovery for more than nominal damages in favor of brothers, sisters or other collateral relatives, it must be shown that the decedent contributed substantially to their support,¹ or would, to a rea-

¹¹ *Philpott v. Pennsylvania R. Co.*, 175 Pa. St. 570; 34 Atl. 856.

¹² *Stimpson v. Wood*, 57 L. J., Q. B. 484; 59 L. T. 218; 36 W. R. 734 [husband occasionally gave something to adulterous wife]; *Fort Worth, etc. R. Co. v. Floyd* [Tex. Civ. App.], 21 S. W. 544; [wife open prostitute].

¹³ *Brash v. Steele*, 7 D. B. M. [Scotch], 539.

¹⁴ Ga. Code, § 2971; *Boswell v. Barnhart*, 96 Ga. 521; 23 S. E. 414. In such action the measure of damages is not affected by the wants of the family, but depends solely on the value of the husband's life. In estimating such value by age, habits, health, occupation, expectation of life, ability to labor, probable increase or diminution of that ability with lapse of time, rate of wages, etc., the necessary personal expenses

of the husband should be deducted, and the balance, reduced to its present value, would be the value of the life (*Central R. Co. v. Rouse*, 77 Ga. 393; 3 S. E. 307; followed, *Savannah, etc. R. Co. v. Flannagan*, 82 Ga. 579; 9 S. E. 471).

¹⁵ *North Chicago R. Co. v. Brodie*, 156 Ill. 317; 40 N. E. 942.

¹ *Hodnett v. Boston & Albany R. Co.*, 156 Mass. 86; 30 N. E. 224. Where decedent was addicted to the use of intoxicating liquors, was careless in his work, and did not save his earnings, his brothers and sisters, to whose support he had never contributed, were entitled to nominal damages only (*Anderson v. Chicago, etc. R. Co.*, 35 Neb. 95; 52 N. W. 840). But see *Kelly v. Twenty-third St. R. Co.* (14 Daly, 418), where decedent's only relatives were a brother and sister in Ireland and three

sonable certainty, have done so,² or else that he had begun to accumulate property to such an extent that they had a reasonable prospect of inheriting from him, had he lived longer, the amount allowed in damages.³ But it is not necessary to prove, with any precision, the amount contributed by him.⁴

§ 775. Damages for death : how ascertained.—Even under a “pecuniary injury” statute, the jury have a large discretion in assessing damages;¹ and the court will not interfere with this assessment, unless they have clearly abused this discretion.² They cannot (in the absence of statutory requirement)

nephews in New York, but there was no evidence that he ever did anything to assist them, nor was it shown what the proceeds of his business amounted to. Held, that a verdict of \$1,000 was not excessive.

¹The damages which dependent minor sisters and nieces should recover for death by wrongful act should be limited to such an amount as would compensate them for the loss of what they could reasonably have expected until they arrived at age (*Duval v. Hunt*, 34 Fla. 85; 15 So. 876).

²In an action for the benefit of the collateral kindred, the measure of damages is what the deceased would probably have accumulated afterwards if he had lived; and, where the deceased has accumulated nothing for any one up to the time of his death in middle life, only nominal damages will be awarded (*Howard v. Delaware, etc. Canal Co.*, 40 Fed. 195).

³*Ohio, etc. R. Co. v. Wangelin*, 152 Ill. 138; 38 N. E. 760. See also *Tennessee Coal & R. Co. v. Herndon*, 100 Ala. 451; 14 So. 287.

⁴*Chicago, etc. R. Co. v. Swett*, 45 Ill. 197; *Chicago, etc. R. Co. v. Shannon*, 43 Id. 338.

²*Houghkirk v. Delaware, etc.*

Canal Co., 92 N. Y. 219, 224; *Tilley v. Hudson River R. Co.*, 29 Id. 252. See *Oldfield v. Harlem R. Co.*, 14 Id. 310; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60; *Chicago v. Major*, 18 Ill. 349; *Chicago, etc. R. Co. v. Shannon*, 43 Id. 338. The measure of damages is for the jury to determine; and their decision will not be disturbed unless shown to have been affected by improper influences (*Kane v. Mitchell Transp. Co.*, 90 Hun, 65; 35 N. Y. Supp. 581). There being serious question whether there was negligence by defendant, or contributory negligence by deceased, the jury found a verdict for plaintiff, damages 40s. — £1 for the widow, and 10s. for each of the children. The court granted a new trial on the ground that the jury had shrunk from the duty of deciding the issue (*Springett v. Balls*, 7 Best & S. 477). In *Bierbauer v. N. Y. Central R. Co.* (15 Hun, 559; *aff'd*, 77 N. Y. 588), a father of sixty-five was the next of kin, and lived in Germany, and the probability that he suffered pecuniary loss to any considerable extent was deemed very remote, yet the courts refused to disturb a verdict which was up to the full statutory allowance of \$5,000. See § 769, *ante*.

be called upon to itemize them;³ and it is not necessary that the evidence should afford means for estimating the loss with accuracy.⁴ The jury may use their own knowledge and judgment in estimating damages, without testimony, in dealing with matters of common experience, such, for example, as the value of future service.⁵ But evidence of the age, health, and habits of an adult decedent, not showing his earning capacity nor expenditures, will not support a verdict for substantial damages.⁶ The jury must be instructed as to the grounds upon which they should allow damages;⁷ and it is error to

³ Union Pac. R. Co. v. Dunden, 37 Kans. 1; 14 Pac. 501.

⁴ Baltimore, etc. R. Co. v. Then, 159 Ill. 535; 42 N. E. 971. In Andrews v. Chicago, etc. R. Co. (86 Iowa, 677; 53 N. W. 399), there was no proof of pecuniary injury. The court charged: "Make the best estimate you can of the loss in money suffered by the estate." Held, no error [following Donaldson v. Mississippi, etc. R. Co., 18 Iowa, 280].

⁵ In O'Mara v. Hudson River R. Co. (38 N. Y. 445), there was no proof of the pecuniary value of decedent's life [a boy of eleven]. Held, that the jury, acting upon their knowledge and without proof, had the right to say that the boy's services, until his majority, were valuable to his father, and to estimate their value. An instruction that the jury could use their common knowledge in assessing the damages, without evidence as to the amount thereof, was not erroneous (Union Pacific R. Co. v. Dunden, 37 Kans. 1; 14 Pac. 501). No witness need testify to the pecuniary value of decedent's services (Petrie v. Columbia, etc. R. Co., 29 S. C. 303; 7 S. E. 515).

⁶ McHugh v. Schlosser, 159 Pa. St. 480; 28 Atl. 291.

⁷ It is proper to consider the age, health, habits, and occupation of de-

ceased; his expectation of life, ability to labor, and the probable increase or diminution of that ability with lapse of time; his earning power, rate of wages, and the care which one of his character might be expected to give to his family; and the measure of damages will be the present value of such amount after deducting the personal expenses of deceased (St. Louis, etc. R. Co. v. Sweet, 60 Ark. 550; 31 S. W. 571). This is an excellent summary of the law on this point. The following cases are in part to the same effect, but not so full: Clapp v. Minneapolis, etc. R. Co., 36 Minn. 6; 29 N. W. 340; Chattanooga, etc. R. Co. v. Clowdis, 90 Ga. 258; 17 S. E. 88; Carlson v. Oregon, etc. R. Co., 21 Oreg. 450; 28 Pac. 497; Spaulding v. Chicago, etc. R. Co., Iowa, ; 67 N. W. 227; Wheelan v. Chicago, etc. R. Co., 85 Iowa, 167; 52 N. W. 119. A man's net earnings per annum are his pecuniary value to his family, and, in estimating these, the age, health and occupation of deceased may be considered (Blackwell v. Lynchburg, etc. R. Co., 111 N. C. 151; 16 S. E. 12). The jury may consider what deceased would have brought to his next of kin while living, and what was their prospect of inheriting from him when dead (Johnson v. Long Island

charge that the jury may assess such sum as they may think proportioned to the injury, without confining the right of recovery to actual damages, or (under a "pecuniary injury" statute) stating that the sum found must be a compensation for the pecuniary injury sustained.⁸ They should be plainly instructed to allow only the present capitalized value of future damages.⁹ The jury are not at liberty to award damages, for which there is no foundation in the evidence, nor (under a "pecuniary" statute) which are incapable of fair compensation.¹⁰ Standard annuity or other life tables are competent evidence to show the decedent's expectancy of life;¹¹ but they are not conclusive upon the jury, although uncontradicted,¹²

R. Co. 80 Hun, 306; 30 N. Y. Supp. 318). Skill and capacity for the management of property and affairs are elements to be considered in assessing damages in an action to recover for the death of one living on his income (*Skottowe v. Oregon*, etc. R. Co., 22 Oreg. 430; 30 Pac. 222). The court must not direct the jury to allow damages to a widow for her husband's death on the presumption that he would have continued to make earnings during his expectancy of life (*Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173; 23 S. W. 211).

⁸ *Galveston, etc. R. Co. v. Worthy*, 87 Tex. 459; 29 S. W. 376; *McGowan v. St Louis Ore, etc. Co.*, 109 Mo. 518; 19 S. W. 199. But compare *Browning v. Wabash R. Co.*, 124 Mo. 55; 27 S. W. 644; *Haehl v. Wabash R. Co.*, 119 Mo. 325; 24 S. W. 737.

⁹ *Pickett v. Wilmington, etc. R. Co.*, 117 N. C. 616; 23 S. E. 264; *St. Louis, etc. R. Co. v. Sweet*, 60 Ark. 550; 31 S. W. 571. The measure of damages, where the heirs are in no dependence on deceased for support, is such sum as, with legal interest during the period of his expectancy of life, would produce at the expiration of such period a sum equal to the accumulations of his earnings for the same period, estimated on the

basis of his health, ability, habits of sobriety, industry, economy, gross earnings, and expenditures (*McAdory v. Louisville, etc. R. Co.*, 94 Ala. 272; 10 So. 507). Compare *Lowe v. Chicago, etc. R. Co.*, 89 Iowa, 420; 56 N. W. 519; *Spaulding v. Chicago, etc. R. Co.*, Iowa, ; 67 N. W. 227.

¹⁰ *Walker v. Lake Shore, etc. R. Co.*, 104 Mich. 606; 62 N. W. 1032.

¹¹ The Northampton tables are competent evidence to show the probable duration of decedent's life (*Sauter v. N. Y. Central, etc. R. Co.*, 66 N. Y. 50; *Schell v. Plumb*, 55 Id. 592). So as to tables given in local statutes (*Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513; 44 N. W. 502) or any other standard tables (*Steinbrunner v. Pittsburgh, etc. R. Co.*, 146 Pa. St. 504; 23 Atl. 239); and a witness may compute from these the number of years that the deceased would probably have lived (*San Antonio, etc. R. Co. v. Bennett*, 76 Tex. 151; 13 S. W. 319; *O'Mellia v. Kansas City, etc. R. Co.*, 115 Mo. 205; 21 S. W. 503).

¹² The jury may take into consideration the age, health, habits, and earning capacity of deceased in arriving at the measure of damages, and need not confine themselves to

except against the party putting them in evidence, who is bound by them, if unmodified by other evidence.¹³

§ 776. Statutory limitations of amount.— In Maine, Massachusetts, Connecticut, Illinois, Wisconsin, Minnesota, Missouri, Nebraska, Colorado, Wyoming and Oregon, the amount of recovery for causing death is expressly limited by statute to \$5,000. In New Hampshire the limit is \$7,000; and in Virginia, West Virginia, Ohio, Indiana, Kansas, Utah, Oklahoma, and the District of Columbia, it is \$10,000, and in Montana it is \$20,000. In all other jurisdictions, we believe, the amount of recovery is not limited by statute.¹

tables of longevity only (Central R. Co. v. Thompson, 76 Ga. 770; Atchison, etc. R. Co. v. Hughes, 55 Kan. 491; 40 Pac. 919; Armsworth v. Southwestern R. Co., 11 Jur. 758). When there is sufficient evidence as to one's age, health, physical condition, and habits, the jury may form a reasonable estimate as to the value of his life without resorting to the standard mortality tables (Boswell v. Barnhart, 96 Ga. 521; 23 S. E. 414; Deisen v. Chicago, etc. R. Co., 43 Minn. 454; 45 N. W. 864).

¹³ Where the plaintiff had introduced in evidence mortality tables and had offered no other evidence to show that the probability of life of his decedent was greater or less than that shown by such tables, it was error to charge that the tables were not controlling (Nelson v. Lake Shore

etc. R. Co., 104 Mich. 582; 62 N. W. 993).

¹ The Constitution of Pennsylvania (going into effect January 1, 1874), forbids the legislature limiting "the amount to be recovered for injuries resulting in death, or for injuries to persons or property" (art. 2, § 21). The Constitution of New York (going into effect January 1, 1895), provides: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation" (art. 2, § 18). Recovery was previously limited to \$5,000 (Co. Civ. Proc. § 1904), and this limitation still applies in cases of injuries suffered before January 1, 1895 (Isola v. Weber, 147 N. Y. 329; 41 N. E. 704).

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